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REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA

DURING THE

OCTOBER TERM, 1915-1916

BY

LAWRENCE H. LEE

REPORTER OF DECISIONS

VOL. 196

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JUDGES OF CIRCUIT COURTS DURING THE TIME THE CASES REPORTED IN THIS VOLUME WERE TRIED

| | | |
|-------------------|----------------------------|-------------|
| 1st Circuit..... | HON. BEN D. TURNER..... | Grove Hill. |
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| 15th Circuit..... | HON. LEON McCORD..... | Montgomery. |
| 16th Circuit..... | HON. J. E. BLACKWOOD..... | Gadsden. |

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|-------------------------------------|-------------------------------------|
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JUDGES OF INFERIOR COURTS OF LAW AND EQUITY DURING THE TIME THE CASES REPORTED IN THIS VOLUME WERE TRIED

| | | |
|---|---|--|
| Anniston City Court..... | HON. THOMAS W. COLEMAN, JR..... | Anniston. |
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| Hale County Court..... | HON. C. E. WALLER..... | Greensboro. |
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| Mobile City Court..... | HON. O. J. SEMMES..... | Mobile. |
| Mobile Law and Equity Court..... | HON. SAFFOLD BERNEY..... | Mobile. |
| Montgomery City Court..... | HON. GASTON GUNTER..... | Montgomery. |
| Morgan County Law and Equity Court..... | HON. THOMAS W. WERT..... | Decatur. |
| Marengo County Law and Equity Court..... | HON. E. J. GILDER..... | Demopolis. |
| Madison County Law and Equity Court..... | HON. J. H. BALLENTINE..... | Huntsville. |
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| Selma City Court..... | HON. J. W. MABRY..... | Selma. |
| Shelby County Court..... | HON. E. S. LYMAN..... | Columblana |
| Talladega City Court..... | HON. MARION H. SIMS..... | Talladega. |
| Tuscaloosa County Court..... | HON. H. B. FOSTER..... | Tuscaloosa. |

TABLE OF CASES REPORTED IN THIS VOLUME

| | | | |
|--------------------------------------|-----|--------------------------------------|-----|
| Aetna Ins. Co. v. Hann..... | 234 | Burroughs & Taylor Co. ats. | |
| Ala. G. S. R. R. Co. v. Loveman | | Beasley | 397 |
| Comp. Co. | 683 | Bush ats. Russell..... | 309 |
| Ala. G. S. R. R. Co. v. Skotzy..... | 25 | Butler, et al. ats. Webb..... | 181 |
| Ala. G. S. R. R. Co. v. Smith..... | 77 | | |
| Ala. G. S. R. R. Co. v. Taylor..... | 37 | Cannon ats. Martin..... | 151 |
| Ala. Power Co. v. Middleton..... | 1 | Capital Sec. Co. v. Owen..... | 385 |
| Albertville, Town of v. Hooper..... | 642 | Carlock ats. Cent. of Ga. Ry. Co. | 659 |
| Allgood, Aud., v. Sloss-S. S. & | | Cash ats. Hackett..... | 403 |
| I. Co. | 500 | C. of Ga. Ry. Co. v. Carlock..... | 659 |
| Altom ats. Moore..... | 158 | C. of Ga. Ry. Co. ats. Emerson..... | 280 |
| Armstrong ats. Gilliland..... | 513 | C. of Ga. Ry. Co v. Mathis..... | 32 |
| Atlanta B. & I. Co. ats. Colley..... | 374 | Chambless v. Jones..... | 175 |
| | | Chapman ats. Tarrance..... | 88 |
| Bailey v. Southern Ry..... | 133 | Christie ats. Southern Dredg. | |
| Barrett Bros. Shipping Co., ex | | Co. | 421 |
| parte | 655 | City of Birmingham v. Hawkins | 127 |
| Bank of Phoenix City v. Taylor | 665 | City of Birmingham v. McKin- | |
| Beasley, et al. v. Burroughs & | | non | 56 |
| Taylor Co. | 397 | City of Tuscaloosa ats. Brown..... | 475 |
| Beatty v. Palmer..... | 67 | Clancey ats. Hamilton..... | 194 |
| Beavers & Co. ats. Rice..... | 355 | Clarke ats. Minge..... | 617 |
| Bell, et al. v. Bell, et al. | 465 | Clarke ats. Morrison..... | 670 |
| Bell v. McKay & Co..... | 408 | Cohill ats. B. R. L. & P. Co..... | 278 |
| Bell ats. Seals P. & O. Co..... | 290 | Cole Motor Car Co. v. Tebault..... | 382 |
| Berthold & J. L. Co. v. Geo. W. | | Colley v. Atlanta B. & I. Co..... | 374 |
| Phalin L. Co. | 362 | Collins ats. Ray..... | 478 |
| Betts, et al. v. Ward..... | 248 | Commerce Finance Co. v. Coop- | |
| Birmingham, City of v. Hawkins | 127 | er Bros. | 285 |
| Birmingham, City of v. McKin- | | Cook v. Cook..... | 180 |
| non | 56 | Cooper Bros. ats. Commerce Fi- | |
| Birmingham E. & B. Ry. Co. v. | | nance Co. | 285 |
| Stagg | 612 | Corinth B. & T. Co. ats. Shef- | |
| B. R. L. & P. Co. v. Cohill..... | 278 | field Nat. Bank..... | 275 |
| B. R. L. & P. Co. v. Gray..... | 42 | Crosthwaite ats. Wallace..... | 356 |
| B. R. L. & P. Co. v. Sprague..... | 148 | Cudd, ats. Mitchell, et al..... | 162 |
| Birm. So. Ry. Co. v. Stephens..... | 107 | Cullman Co. ats. Searcy, et al..... | 287 |
| Birm. W. W. Co. v. Hernandez..... | 438 | | |
| Bloch ats. Holmes..... | 322 | Dabbs v. Dabbs..... | 164 |
| Boston Shoe Shop v. McBroom | | Danforth v. McClellan..... | 567 |
| Shoe Shop | 262 | Daniel v. Hughes..... | 368 |
| Brannan ats. Ray..... | 113 | Davis, et al. ats. House, et al..... | 153 |
| Brookside-Pratt Min. Co. v. Mc- | | Davis ats. L. & N. R. R. Co..... | 14 |
| Allister, et al. | 110 | Davison ats. State ex rel. Shoe- | |
| Brown v. City of Tuscaloosa..... | 475 | maker | 453 |
| Brown v. Moon..... | 391 | Dawsey ats. Griffin..... | 218 |
| Brown, State ex rel. v. Slaugh- | | Dawson v. The State..... | 593 |
| ter | 428 | Dean ats. Dunn..... | 486 |
| Bugg, et al. ats. State, ex rel. | | Dillard, et al. ats. State ex rel. | |
| Mims | 460 | Knox | 539 |

| | | | |
|---|-----|---|-----|
| Dooley ats. Temple..... | 360 | Hartsell v. Turner..... | 299 |
| Doran & Co. v. Gilreath..... | 377 | Hawkins, ats. City of Birmingham..... | 127 |
| Doster-N. Drug Co. ats. The State..... | 447 | Hayes ats. Landers..... | 533 |
| Dunn v. Dean..... | 486 | Headley v. Harris..... | 520 |
| Eagle Coal Co. v. Gravlee..... | 188 | Henderson ats. First Nat. Bank..... | 393 |
| Edwards, ex parte..... | 638 | Hernandez ats. B'ham W. W. Co..... | 438 |
| Emerson v. C. of Ga. Ry. Co..... | 280 | Herring ats. State, ex rel. Newton..... | 455 |
| Ensley Motor Car Co. v. O'Rear..... | 481 | Hershey Choc. Co. v. Yates, et al..... | 657 |
| Ex parte Barrett Bros. Shipping Co..... | 655 | Hill, ex parte..... | 462 |
| Ex parte Ewards..... | 638 | Holmes v. Bloch..... | 322 |
| Ex parte Farrell..... | 434 | Holt Lum. Co. v. Givens..... | 640 |
| Ex parte Hill..... | 462 | Hooper ats. Town of Albertville..... | 642 |
| Farrell v. Farrell..... | 167 | House, et al. v. Davis, et al..... | 153 |
| Farrell, ex parte..... | 434 | Howard ats. Republic I. & S. Co..... | 663 |
| Favish ats. W. U. T. Co..... | 4 | Hughes ats. Daniel..... | 368 |
| Fidelity-Phoenix F. I. Co. v. Ray..... | 425 | In re Mitchell..... | 430 |
| Finney v. Studebaker Corporation..... | 422 | Interstate L. & I. Co. v. Logan..... | 196 |
| First Bank of Crossville ats. Hall, et al..... | 627 | Interstate M. & B. Co. ats. Todd, et al..... | 169 |
| First Nat. Bank v. Henderson..... | 393 | J. C. Walden Auto Co. v. Mixon..... | 346 |
| Franklin v. So. Ry. Co..... | 118 | Jeffcoat ats. Smith..... | 96 |
| Fricks ats. So. Ry. Co..... | 61 | Jenkins ats. L. & N. R. R. Co..... | 136 |
| F. W. Cook Brew. Co. ats. Wallace..... | 245 | Johnson, et al. v. Pinckard & Lay..... | 259 |
| Garden ats. Knight..... | 516 | Jones ats. Chambless..... | 175 |
| Garrett v. L. & N. R. R. Co..... | 52 | Jones & Weeden ats. Kellar..... | 417 |
| Garrish ats. McLeod..... | 389 | Jordan ats. Kyle..... | 509 |
| Geo. W. Phalin L. Co. ats. Berthold-J. L. Co..... | 362 | Kearns v. Mobile L. & R. R. Co..... | 99 |
| Georgia Cotton Co. v. Lee..... | 599 | Kellar v. Jones & Weeden..... | 417 |
| Gilliland v. Armstrong..... | 513 | Kershaw v. McKown..... | 123 |
| Gilreath ats. Doran & Co..... | 377 | Knight v. Garden..... | 516 |
| Givens ats. Holt Lumber Co..... | 640 | Knox, State ex rel. v. Dillard, et al..... | 539 |
| Goodman ats. Metropolitan L. I. Co..... | 304 | Kyle v. Jordan..... | 509 |
| Graham ats. Miller..... | 230 | Lamb v. Roberts..... | 679 |
| Gravlee, et al. ats. Eagle Coal Co..... | 188 | Lambert ats. Smith, et al..... | 269 |
| Gray ats. B. R. L. & P. Co..... | 42 | Landers v. Hayes..... | 533 |
| Greer v. Malone-Beall Co..... | 401 | Langley, et al. v. Langley..... | 566 |
| Griffin v. Dawsey..... | 218 | Lee, et al. v. Lee..... | 522 |
| Guin v. Guin, et al..... | 221 | Limblad ats. Ward..... | 146 |
| Hackett v. Cash..... | 403 | Logan ats. Interstate L. & I. Co..... | 196 |
| Hall, et al. v. First Bank of Crossville..... | 627 | L. & N. R. R. Co. v. Davis..... | 14 |
| Hamilton v. Clancey..... | 194 | L. & N. R. R. Co. ats. Garrett..... | 52 |
| Hammond ats. Reed..... | 302 | L. & N. R. R. Co. v. Jenkins..... | 136 |
| Hann, et al. ats. Aetna I. Co., et al..... | 234 | L. & N. R. R. Co. v. Lovell..... | 94 |
| Harris ats. Headley..... | 520 | L. & N. R. R. Co. v. Lynne..... | 21 |
| | | L. & N. R. R. Co. v. Porter..... | 17 |
| | | Lovell ats. L. & N. R. R. Co..... | 94 |
| | | Loveman Comp. Co. ats. A. G. S. R. R. Co..... | 683 |

CASES REPORTED IN THIS VOLUME.

IX

| | | | |
|---|-----|---|-----|
| Lowy, et al. v. Rosengrant..... | 337 | Paitry v. State..... | 598 |
| Lynne ats. L. & N. R. R. Co..... | 21 | Palmer ats. Beatty..... | 67 |
| McAllister, et al. ats. Brookside- P. M. Co..... | 110 | Palmer ats. Sulzby..... | 645 |
| McBroom Shoe Shop ats. Bos- ton Shoe Shop..... | 262 | Palos C. & C. Co. ats. Mullins..... | 261 |
| McClellan ats. Danforth..... | 567 | Peoples Shoe Co. v. Skally..... | 349 |
| McCoy ats. U. S. C. I. P. & F. Co..... | 45 | Pinckard & Lay ats. Johnson, et al..... | 259 |
| McKay & Co. ats. Bell..... | 408 | Poe v. Southern Ry. Co..... | 103 |
| McKenzie v. Stewart, et al..... | 241 | Porter ats. L. & N. R. R. Co..... | 17 |
| McKinnon ats. City of Birming- ham..... | 56 | Porter, et al. v. Watkins..... | 333 |
| McKown ats. Kershaw..... | 123 | Qualls v. Qualls..... | 524 |
| McLeod v. Garrish..... | 389 | Ray v. Brannan..... | 113 |
| Madison v. State..... | 590 | Ray v. Collins..... | 478 |
| Malone-Beall Co. ats. Greer..... | 401 | Ray ats. Fidelity-P. F. I. Co..... | 425 |
| Markstein ats. Ward..... | 209 | Reed v. Hammond..... | 302 |
| Martin v. Cannon..... | 151 | Republic I. & S. Co. v. Howard..... | 663 |
| Martin v. State..... | 584 | Reynolds ats. Neeley..... | 581 |
| Martin v. Walker, et al..... | 469 | Reynolds, et al. v. The State..... | 586 |
| Maryland C. & C. Co. ats. Rob- inson..... | 604 | Rice v. Beavers & Co..... | 355 |
| Mathis ats. C. of Ga. Ry. Co..... | 32 | Roberts ats. Lamb, Rec..... | 679 |
| Meador & Son v. Standard Oil Co..... | 365 | Robinson v. Maryland C. & C. Co..... | 604 |
| Metropolitan L. I. Co. v. Good- man..... | 304 | Rosengrant ats. Lowy, et al..... | 337 |
| Middleton v. Ala. Power Co..... | 1 | Russell v. Bush..... | 309 |
| Miller v. Graham..... | 230 | Rutledge ats. T. C. I & R. R. Co..... | 59 |
| Miller ats. W. U. T. Co..... | 620 | Seals P. & O. Co. v. Bell, et al..... | 290 |
| Mims, State ex rel. v. Bugg, et al..... | 460 | Searcy, et al. v. Cullman Co..... | 257 |
| Minge v. Clark..... | 617 | Sheffield Nat. Bank v. Corinth B. & T. Co..... | 275 |
| Mitchell v. Cudd..... | 162 | Shoemaker, State ex rel. v. Da- vison..... | 453 |
| Mitchell, in re..... | 430 | Skally ats. Peoples Shoe Co..... | 349 |
| Mixon ats. J. C. Walden Auto Co..... | 346 | Skotzy ats. Ala. G. S. R. R. Co..... | 25 |
| Mobile L. & R. R. Co. ats. Kearns..... | 99 | Slaughter ats. State ex rel. Brown..... | 428 |
| Moon ats. Brown..... | 391 | Sloss-S. S. & I. Co. ats. Allgood, Aud..... | 500 |
| Moore v. Altom..... | 158 | Smith ats. Ala. G. S. R. R. Co..... | 77 |
| Morrison v. Clark..... | 670 | Smith v. Jeffcoat..... | 96 |
| Mullins v. Palos C. & C. Co..... | 261 | Smith v. Lambert..... | 269 |
| Mutual Alliance T. Co. ats. Walker, Supt..... | 154 | Sovereign Camp W. O. W. v. Ward..... | 327 |
| Neeley v. Reynolds..... | 581 | Southern Dredg. Co. v. Christie..... | 421 |
| Neeley ats. Thrasher, et al..... | 576 | So. Ry. Co. ats. Bailey..... | 133 |
| Newton, State ex rel. v. Herring..... | 455 | So. Ry. Co. ats. Franklin..... | 118 |
| O'Connell v. O'Connell, et al..... | 224 | So. Ry. Co. v. Fricks..... | 61 |
| Oldacre v. State..... | 690 | So. Ry. Co. ats. Poe..... | 103 |
| O'Rear, Treas. ats. Ensley Mo- tor Car Co..... | 481 | Sprague ats. B. R. L. & P. Co..... | 148 |
| Owen ats. Capital Sec. Co..... | 385 | Stagg ats. B. E. & B. Ry. Co..... | 612 |
| | | Standard Oil Co. ats. Meador & Son..... | 365 |
| | | Standard Steel Co. ats. Wheeler..... | 634 |
| | | State ats. Dawson..... | 593 |
| | | State v. Doster-N. Drug Co..... | 447 |
| | | State ats. Madison..... | 590 |

| | | | |
|--------------------------------------|-----|-----------------------------------|-----|
| State ats. Martin..... | 584 | Turner ats. Hartsell..... | 299 |
| State ats. Oldacre..... | 690 | Tuscaloosa, City of v. Brown..... | 475 |
| State ats. Paitry..... | 598 | | |
| State ats. Reynolds, et al..... | 586 | United States C. I. P. & F. Co. | |
| State v. W. U. T. Co..... | 570 | v. McCoy..... | 45 |
| State, ex rel. Brown v. Slaugh- | | | |
| ter..... | 428 | Vassar ats. Waddail..... | 184 |
| State, ex rel. Knox v. Dillard..... | 539 | | |
| State, ex rel. Mims v. Bugg, et | | Waddail v. Vassar..... | 184 |
| al..... | 460 | Wallace v. Crosthwaite..... | 356 |
| State, ex rel. Newton v. Herr- | | Wallace v. F. W. Cook Brew. | |
| ing..... | 455 | Co..... | 245 |
| State, ex rel. Shoemaker v. Da- | | Walker ats. Martin..... | 469 |
| vison..... | 453 | Walker, Supt. v. Mutual Alli- | |
| State, Use Winston County v. | | ance T. Co..... | 154 |
| Tingle..... | 505 | Walsh Mfg. Co. v. W. T. Smith | |
| Stephens ats. Bir. So. Ry. Co..... | 107 | L. Co..... | 371 |
| Stewart ats. McKinnon..... | 241 | Ward ats. Betts, et al..... | 248 |
| Stewart ats. Yarbrough..... | 160 | Ward v. Limblad..... | 146 |
| Studebaker Corp. ats. Finney..... | 422 | Ward, et al. v. Markstein..... | 209 |
| Sulzby v. Palmer..... | 645 | Ward ats. Sov. Camp W. O. W..... | 327 |
| | | Watkins ats. Porter, et al..... | 333 |
| Tarrance v. Chapman..... | 88 | Webb v. Butler..... | 181 |
| Taylor ats. Ala. G. S. R. R. Co..... | 37 | Wes. U. T. Co. v. Favish..... | 4 |
| Taylor ats. Bank of Phoenix | | Wes. U. T. Co. v. Miller..... | 620 |
| City..... | 665 | Wes. U. T. Co. ats. State..... | 570 |
| Tebault ats. Cole Motor Car Co..... | 382 | Wheeler v. Standard Steel Co..... | 634 |
| Temple v. Dooley..... | 360 | Winston County, State Use of v. | |
| Tenn. C. I. & R. R. Co. v. Rut- | | Tingle..... | 505 |
| ledge..... | 59 | Woolbert ats. Reilly..... | 191 |
| Thrasher, et al. v. Neelev..... | 576 | W. T. Smith L. Co. ats. Walsh | |
| Tingle ats. State use Winston | | Mfg. Co..... | 371 |
| County..... | 505 | | |
| Todd, et al. v. Interstate M. & | | Yarbrough v. Stewart..... | 160 |
| B. Co..... | 169 | Yates ats. Hershey Choc. Co..... | 657 |
| Town of Albertville v. Hooper..... | 642 | | |

MEMORANDA

OF

CASES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME,
WHICH ARE ORDERED NOT TO BE REPORTED
IN FULL.

| | | | |
|----------------------------------|-----|--------------------------------------|-----|
| Allgood, Aud. v. Alabama Co..... | 695 | Ex parte Fox | 701 |
| Allgood, Aud. v. Grasselli | | Ex parte Gorman..... | 702 |
| Chem. Co. | 696 | Ex parte Pugh | 699 |
| Allgood, Aud. v. Dwight Mfg. | | Ex parte White..... | 702 |
| Co. | 695 | | |
| Allgood, Aud. v. Semmet Solvay | | Harden v. L. & N. R. R. Co..... | 698 |
| Co. | 696 | | |
| Allgood, Aud. v. Standard Oil | | Kelley v. Graves..... | 703 |
| Co. | 695 | | |
| Alabama S. & N. Co. v. Budwig | | McCrory, et al. v. Donald..... | 703 |
| & M. F. B. Co..... | 697 | Mathis v. Meadows | 698 |
| Alabama C. G. & A. Ry Co. v. | | Montgomery L. & W. P. Co. v. | |
| City of Gadsden..... | 699 | New Farley Nat. Bank..... | 698 |
| | | | |
| Bibb v. The State..... | 696 | Norton v. House..... | 703 |
| B. R. L. & P. Co. v. Harris..... | 697 | | |
| B. R. L. & P Co. v. Vinzant..... | 697 | Prater v. The State..... | 703 |
| Box v. The State..... | 700 | | |
| B'ham Trust & Sav. Co. v. | | Ray v. Carbon Hill Banking Co. | 698 |
| Frederick | 700 | | |
| | | Scott v. The State..... | 698 |
| Collins v. Butler Oil Co..... | 702 | Sloss-S. S. & I. Co. v. Mansell..... | 703 |
| Cook v. Lamb, et al..... | 697 | State, ex rel. Atty. Gen. v. Dan- | |
| Consumers C. & F. Co. v. Davis | 697 | iel | 704 |
| Cruseau v. The State..... | 702 | State, ex rel. Melton v. Slaugh- | |
| | | ter | 699 |
| Ex parte Buckheit..... | 700 | Sweeney, et al. v. Sweeney, et al. | 699 |
| Ex parte Daniel | 700 | | |
| Ex parte Dunaway | 701 | W. U. Tel. Co. v. S. & N Ala. | |
| Ex parte Everage..... | 701 | Ry. Co. | 704 |
| Ex parte Fox | 701 | | |

CASES

IN THE

SUPREME COURT OF ALABAMA

OCTOBER TERM 1915-16

Middleton v. Alabama Power Co.

Trespass.

(Decided January 20, 1916. Rehearing denied March 30, 1916.
71 South. 761.)

1. **Fixtures; Houses.**—Unless the builder reserves the right of removal, houses erected upon the land of another prima facie become part of the realty.

2. **Same; Trade Fixtures.**—Where improvements consist of what are termed "trade fixtures," they do not become prima facie part of the land on which they stand.

3. **Same; Agreement.**—By contract the parties may make trade fixtures a part of the land on which they stand.

4. **Same; Right of Removal.**—A reservation of a fixture, or the right to remove it at the expiration of the lease, may be made by oral agreement.

5. **Evidence; Varying Writing.**—Where the written lease deals with the subject of fixtures, it cannot be varied by an oral agreement as to the fixtures.

6. **Same; Similar Evidence.**—Where the lease did not provide what was to become of houses erected by the lessee on the land after the termination of the lease, and the lessee introduced evidence tending to show that such houses were trade fixtures, the lessor could show an agreement that the houses were not removable.

7. **Trespass; Party Entitled to Sue; Possession.**—A lessor not in possession cannot sue in trespass for the wrongful removal of fixtures placed on the premises by the lessee.

APPEAL from Chilton Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by J. H. Middleton against the Alabama Power Company and another. From a judgment for defendants, plaintiffs appeals. Reversed and remanded.

[Middleton v. Alabama Power Co.]

The trespass alleged is the tearing down and removing from a certain five acres of land 12 houses alleged to belong to defendant. The complaint was afterwards amended by adding a count for conversion of certain lumber. It appears that the Alabama Power Company by its contractors had leased this five acres of land from plaintiff for the purpose of quarrying rock for the building of its dams, and had placed thereon 15 or 16 houses for use in its quarrying operations, and when the lease expired, or rather when the quarrying had been finished, all of these houses but 3 were removed, together with the machinery and railroads. The contract provided, in substance, a lease of the five acres described, and the right to take rock and other mineral substances for building purposes in and under said land, and also the right to build and operate one or more railroad tracks over and across the same, and to locate and operate equipment and machinery on said land, and to build structures, houses, and habitations for workmen, all for the quarrying operation, and transportation of said rock and other material, and the right to use the water of Blue Gut creek. It contained the following provisions also: The rights conveyed by this instrument, and all interest in the said land shall revert to the grantors upon completion of the quarry operations on the said land by said grantee, its successors and assigns, at the expiration of said period of three years. The plaintiff also offered to show by parol testimony that it was agreed between Mr. Middleton and the Alabama Power Company that the houses which they were to build on the land for the purposes of their operation were to be left on the land, and not to be removed from it. The court declined to permit this to be done.

MIDDLETON & REYNOLDS, and RIDDLE, BURT & RIDDLE, for appellant. RUSHTON, WILLIAMS & CRENSHAW, and SMITH & GERALD, for appellee.

ANDERSON, C. J.—(1-4)—The general rule is that, when houses are erected upon the land of another, the prima facie intent is that they become part of the realty, though this is by no means conclusive, as the intent of the parties usually controls, and the builder may reserve the right to remove same.—*Powers v. Harris*, 68 Ala. 409. On the other hand, if the improvements or fixtures are what is termed “trade fixtures,” they

[Middleton v. Alabama Power Co.]

do not become prima facie a part of the land.—*Walker v. Tillis*, 188 Ala.313 , 66 South. 54, L. R. A. 1915A, 654. Though the parties may by contract make them a part of the land just as they may prevent a house or permanent fixture from becoming a part of the freehold (*Powers v. Harris, supra; Broaddus v. Smith*, 121 Ala. 335, 26 South. 34, 77 Am. St. Rep. 61), it also seems that a reservation of the chattel or a right to remove same at the expiration of the lease may be done by an oral agreement (*Broaddus Case, supra; Harris v. Powers*, 57 Ala. 139; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749.)

(5) The lease in question is in writing, and, if it dealt with the question of fixtures, any oral agreement previous to the making of said lease, or contemporaneous therewith, would be merged into the writing, but the lease in question does not deal with this question at all, and does not attempt to fix the nature or character of the structures or improvements to be erected by the defendant.

“The writing is presumed to contain the whole of the contract, and will be protected from any invasion of extrinsic stipulations if upon inspection and study of the writing itself, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagement of the parties, and to define the object and measure the extent of such engagements, and to have been designed by the parties to be the repository and evidence of their final intentions. When the writing does not purport to disclose the complete contract, or if, when read in the light of the attendant facts and circumstances, it is apparent that it does not contain all the stipulations of the parties on the subject, the rule does not apply; for when it thus appears that a part only of a complete oral contract, not within the statute of frauds, has been reduced to writing, parol evidence is always admissible to show what the rest of the agreement was; otherwise the contract could not be brought before the court. The entire contract must be proved. The rule is simply that the entire contract, whether it be all in writing, in one paper or in several papers, or partly in writing and partly by parol, should be proved, and this is not at all inconsistent with the parol evidence rule. Matters in parol must not be inconsistent with matters in writing. But even in that case the parts of the agreement to be proved by parol must not be inconsistent with or repugnant to the intention of the

[*Western Union Tel. Co. v. Favish.*]

parties as shown by the written instrument; for, where a contract rests partly in parol, that part which is in writing is not to be contradicted."—21 Am. & Eng. Enc. of Law, p. 1090-1093; *Roquemore v. Vulcan Iron Works*, 151 Ala. 643, 44 South. 557, and cases there cited.

(6) As the contract in question did not attempt to provide what was to become of the houses after the termination of the lease, and as the defendants introduced evidence tending to show that the houses were trade fixtures, the plaintiff should have been permitted to show an agreement with the defendants' agent that the houses were not to be removed, and were not therefore reserved as chattels, and this agreement was in no way inconsistent with or contradictory of the terms of the contract.

(7, 8) The action of the trial court in excluding this evidence cannot be justified upon the theory that the plaintiff could not recover with the evidence in. This was the case as to the trespass counts as the defendants were in possession of the land, but the said possession was no defense to the trover count if the houses belonged to the plaintiff.—*Walker v. Tillis, supra*.

The judgment of nonsuit is set aside, the case is reinstated, and the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

Western Union Tel. Co. v. Favish.

Failure to Deliver Telegram.

(Decided February 3, 1916. 71 South. 183.)

1. **Telegraphs and Telephones; Change in Words; Liability.**—Where a telegraph company in transmitting a message changed the wording so as to induce the addressee to believe that his wife, instead of her father, had been operated on, it was guilty of a breach of contract, and liable at least in nominal damages.

2. **Same; Transmission; Duty.**—A telegraph company is bound to exercise due care and skill to transmit and deliver messages with substantial accuracy.

3. **Same; Damages; Jury Question.**—Where the telegram as filed read "Papa operated on" and it was delivered so as to read "Have operated on"

[Western Union Tel. Co. v. Favish.]

the court properly submitted to the jury the question whether addressee could reasonably have concluded from the message as delivered, that his wife had been subjected to a surgical operation, especially where it appeared that she had not entirely recovered from an operation previously performed.

4. **Same; Evidence.**—In such a case it was competent to show that the sender wife of the addressee had not entirely recovered from an operation performed sometime before.

5. **Same; Tort; Damages.**—Where the addressee could reasonably conclude from the message as delivered to him that his wife instead of her father had been subjected to a surgical operation, the expense of a prompt journey made by him to be with her is recoverable as a part of the damages under a count of the complaint, stating a cause of action in tort.

6. **Negligence; Proximate Cause.**—A person guilty of negligence is held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which did in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought reasonably possible to follow, if it had occurred to his mind at the time of his negligent act.

7. **Telegraphs and Telephones; Transmission; Change; Damages.**—Where the addressee of a telegram was induced by the change in the message to believe that his wife and not her father had been operated on, the action of the addressee in undertaking a trip so as to be with his wife, was a consequence of the breach of the contract to correctly transmit the message which was within the contemplation of the contracting parties even though the precise happening which followed the breach might not have been foreseen.

8. **Same.**—In such an action where the cause of action was set forth in two counts, one *ex delicto*, and one *ex contractu*, the damages recoverable included not only the expense of the trip so undertaken in consequence of the change, but also the cost of the message and the value of the time lost by the addressee in making the trip.

9. **Same; Law Governing.**—A contract made in Alabama to transmit a message and deliver the same in Illinois was presumably an Alabama contract, controlled, in respect to the consequences of its breach, by the laws of Alabama; hence, damages for mental distress unaccompanied by physical injury were recoverable, notwithstanding they would not have been recoverable under the laws of Illinois.

10. **Damages; Objection.**—The question of the recoverability of elements of damages claimed are properly raised by objections to evidence, or by instruction, or by motion to strike, rather than by plea or demurrer.

11. **Contracts; Law Governing.**—Ordinarily a contract is governed as to its nature, obligation, validity and interpretation by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other state, in which case the law of the place of performance, or the law which both parties had in mind must govern.

12. **Torts; Law Governing.**—The measure and element of a recovery of damages for a tort is that prescribed by the law of the place where the tort is committed.

13. **Trial; Reception of Evidence; Objection.**—Where the action was for damages for the incorrect transmission of a message, and the complaint

[Western Union Tel. Co. v. Favish.]

contained two counts, one *ex delicto* and the other *ex contractu*, and a deposition was offered without any specification of its purpose, it being admissible under the *ex delicto*, but not under the count *ex contractu*, its exclusion on a general objection was not ground for a reversal; the rule is that where evidence admissible for one or more purposes is offered without a restriction to the purpose to which it is admissible, and the objection interposed is general, the judgment will not be reversed whether the court sustains or overrules the objection.

14. **Telegraphs and Telephones; Transmission; Instruction.**—Where the complaint contained two counts, one *ex contractu*, and the other *ex delicto*, and it appeared that damages for mental distress, though recoverable under one count, and not recoverable under the other, error cannot be predicated upon the refusal of instructions which failed to recognize this distinction.

15. **Same.**—In this case the giving of an instruction that plaintiff testified that he derived from the message that his wife had been operated on, invaded the province of the jury, and required a reversal where it appeared that plaintiff did not so testify.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by E. W. Favish against the Western Union Telegraph Company for damages for a failure to deliver a telegram in the words in which it was written and delivered to them. Judgment for plaintiff and defendant appeals. Reversed and remanded.

(Transferred from the Court of Appeals under Acts 1911, p. 449.)

FORNEY JOHNSTON, and W. R. C. COCKE, for appellant. SAMUEL B. STERN, for appellee.

MCCLELLAN, J.—(1-4)—The wife of the appellee (plaintiff below) transmitted by local telephone to an agent of the appellant at Birmingham, Ala., the following message addressed to the plaintiff at a certain street number in Chicago, Ill.: “Reasons for not writing *papa* operated on Monday night. Doing as well as can be expected.”

The only signature directed to be affixed to the message was the name Helen. Aside from a presently unimportant mistake in the initial letter of the surname of the addressee, the words of the message were understood and transcribed in the appellant's Birmingham office, and therefrom sent to its Chicago office, just as they were communicated by the wife through the telephone. After the message was received in an office of the appellant located in Chicago, and before the delivery of the message to the appellee, its words were changed to these: “Reasons

[Western Union Tel. Co. v. Favish.]

for not writing have (substituting the word *have* for *papa*) operated on Monday night. Doing as well as can be expected."

It is manifest that such a change in the words of the message wrought a breach of the contract and a negligent breach of duty; and that for either an action could be maintained by the party injured and aggrieved—the least damages awardable being nominal. It is the duty of such agencies to exercise due care and skill to transmit and deliver telegraphic messages with substantial accuracy.—Joyce on Electricity, § 733. This duty and obligation was breached in this instance. If, as there was evidence tending to show, the message was sent by appellee's authorized agent, and the jury so concluded, the appellee was entitled to the general affirmative charge on that condition. So, the only question necessary to be considered on this appeal relates to the matter of damages recoverable. On the evidence in this record, it must be held: The message having been communicated by telephone to a representative of the appellant in its Birmingham office, and there accepted by its agent for transmission and delivery, and the contract there and then made not having bound the plaintiff by any special stipulations or limitations that might have been competently incorporated in the contract, there is not in the case any basis for contentions that could only be predicated of special stipulations or limitations entering into the contract. The court below appropriately submitted to the jury the inquiry, raised by the wording of the message as it was delivered to the addressee in Chicago, whether it could have been reasonably concluded from the words of the message, as delivered to the appellee, that the person, indicated by the signature to the message, had been subjected to a surgical operation. Besides, there was evidence—in addition to the implications afforded by the words of the message as delivered to the appellee—to the effect that the appellee's wife had not entirely recovered from an operation performed some time before, thus, quite naturally it may have been found by the jury, rendering more apt the adoption of the interpretation of the message which accorded with the possibility of a recurrence, during the husband's absence, of the necessity for another operation. There was no error in allowing evidence to the indicated effect; and there was no error in submitting the stated inquiry to the jury's determination.

The message was delivered to appellee about 6:30 p. m. He interpreted the message as referring to an operation performed

[*Western Union Tel. Co. v. Favish.*]

on his wife, and within about two hours he had taken the train for Birmingham, where he arrived the next afternoon to find, as the original of the message stated, that an operation had been performed on his wife's father, and not on his wife.

(5, 6) The cause of action is set forth in two counts. The first count is *ex delicto*, for the breach of duty arising out of the relation and obligations made by the contract; and the second count is *ex contractu*, for the breach of the contract.—*W. U. Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607. The elements of damages claimed in both the counts are substantially the same. They include expenses of the trip to and from Birmingham, from Chicago; loss of time from his business; mental pain and anguish; and the loss of the price paid for the transmission and the delivery of the message. So far as the first count, which is in tort, is concerned, it is clear that the recoverability of expenses claimed depends upon the response to this contingent inquiry; if the message as delivered to the addressee was found by the jury to be reasonably susceptible of the interpretation accorded it by the addressee, was the prompt trip of the appellee to Birmingham a proximate consequence of the negligently caused change in the wording of the message? The addressee had the right to assume that no breach of contractual obligation or negligent act or omission of the appellant had intervened to change the words of the message, and, if the words in the message, as delivered to the addressee, reasonably admitted of the interpretation given them by this addressee, our opinion is that a journey to Birmingham was of the damnifying consequences for which the appellant is responsible. The governing rule, in actions *ex delicto*, is thus stated in *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 249, 250, 26 South. 349, 354: "The logical rule in this connection, the rule of common sense and human experience as well (if indeed there can be a difference between a logical doctrine and one of common sense and experience, as some authorities appear to hold), is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."—*Briggs v. B. R., L. & P. Co.*, 188 Ala. 262, 66 South. 95.

[Western Union Tel. Co. v. Favish.]

It is the ordinary, the normal, man the law must contemplate when standards of conduct, or the probability of action, or the effect of a wrong, are to be considered. When an absent husband is advised, especially without previous warning, that his wife has been submitted to a surgical operation, it is most natural that he should, if practicable, immediately proceed to her bedside. The converse would be highly abnormal and unnatural. This generally known expression of a human characteristic or the probability of such action must enter into the inquiry stated. The message as delivered to the addressee (under the interpretation he put upon it) gave evidence of the fact of the performance of a surgical operation—a matter ever, unless fully explained, of serious import to those nearly related to the subject of the operation; and a natural normal consequence of such advice is to inflict mental distress on a husband. Under the established doctrine above quoted from the *Armstrong Case*, the range of responsibility and accountability of the negligent party is not restricted by the absence of knowledge of the negligent party that “Helen” was the appellee’s wife, or the fact that the appellee would in fact, or would probably, proceed to Birmingham in consequence of the information the (erroneous) message bore to him, under his interpretation of its words. The consequences for which there is responsibility and accountability are such as would occur to the mind of a normal, prudent, and experienced man, advised of all the circumstances. If otherwise entitled to recover, the trip to and from Birmingham and the expenses thereof were of the consequences proximately resulting from the negligent change of the message, and the plaintiff was due to be reimbursed for the reasonable expenditure made by him on that account.

(7-10) Like considerations lead to the conclusion that the action of the appellee in going at once to Birmingham was a consequence of the breach of the contract (declared on the second count) wrought by the change of the words of the message, and was a consequence within the contemplation of the parties in making the contract, even though the precise happenings which followed from the breach may not have been anticipated or foreseen.—*W. U. Tel. Co. v. Crumpton*, 138 Ala. 632, 643, 36 South. 517. The cost of the message and the value of the time lost by plaintiff in making the journey to and from Birmingham are likewise within the elements of recoverable damage under

[Western Union Tel. Co. v. Favish.]

both counts, if the plaintiff was otherwise found to be entitled to recover. The contract for the transmission and delivery of this message was made in the state of Alabama and was to be partly performed in the state of Alabama and in the state of Illinois, as well as in other intervening states through which the lines of this telegraph company extended. The complete performance of the contract could not be accomplished outside of the state of Illinois, any more than without partial service to that ultimate end in Alabama, and other intervening states. So the contract assigns itself to the class of contracts, the performance of which requires service or action in the state where the contract was made and in other states; all with the ultimate object of completed performance in a state other than that in which the contract was made. The appellant's theory was that since damages for mental suffering were not recoverable under the law prevailing in the state of Illinois, unless physical hurt or injury attended the wrong suffered—a condition not present in this instance—the appellee was not entitled to recover in the courts of Alabama for any mental distress occasioned by or resulting from the alteration made in the message. The question thus made presents the inquiry: By what law—that of Alabama or that of Illinois—is the right *vel non* of this plaintiff to recover damages for mental suffering, without physical hurt or injury, to be determined? The court below refused to the defendant the benefit in evidence of the testimony of a qualified practitioner of law in the state of Illinois. The purport of this testimony was to show that the established law of Illinois was as the stated theory of the defendant assumed it to be. A plea was interposed, addressed to both counts, undertaking to assert the same theory against the right of this plaintiff to recover any damages for mental distress. A plea is not the approved method of assailing the recoverability of claimed elements of damages. Objections to the admission of evidence or instructions to the jury, as well as motion to strike, are the recognized means to that end.

(11) "The general rule of law * * * is, that a contract is governed, as to its nature, obligation, validity, and interpretation, by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case the law of the place of performance, or the law which both parties had in view must

[Western Union Tel. Co. v. Favish.]

govern.”—*Sou. Ry. Co. v. Harrison*, 119 Ala. 539, 544, 24 South. 552, 557 (43 L. R. A. 385, 72 Am. St. Rep. 936), and cases there cited. In the *Harrison Case* it was also soundly said: “And the weight of authority is, that this rule requires a contract for the transportation of goods by a common carrier from one state or country to another to be governed by the law of the place where it is made and where the performance begins, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other state or country.”

The numerous decisions and texts cited by Chief Justice BRICKELL aptly support the rule announced; and particular reference may be made to Justice Gray's exhaustive opinion on the subject in *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 447-458, 9 Sup. Ct. 469, 32 L. Ed. 788. The decision of this court in *Sou. Ex. Co. v. Gibbs*, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24, is opposed to the sound rule stated.—*Sou. Ry. Co. v. Harrison*, *supra*, and other authorities. The court delivered no opinion in *W. U. T. Co. v. Hill*, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058. The error in the *Gibbs Case* seems to have resulted from the misapprehension that the contract there under view was to be wholly performed in Alabama; whereas, it was made in New York, and was to be partially performed there and in intervening states, as well as in Alabama. The consideration effectually prevents the acceptance as authority of the quotation therein made from *Hanrick v. Andrews*, 9 Port. 9, 26. The soundness of the cases of *Curtis v. D. L. W. R. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271, and *Brown v. Camden R. R. Co.*, 83 Pa. 316—the authorities largely relied upon to support the view prevailing in our *Gibbs Case*—were reflected upon by the observations of Justice Gray in the opinion before cited. Certainly these two decisions, as well as the *Gibbs Case*, are not in harmony with the distinct weight and reasons of the authorities on the question. The editor's note to the *Gibbs Case*, 18 L. R. A. (N. S.) 874, may be consulted with profit. The Ohio court, in *Pittsburg Ry. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732, cited in the opinion in the *Gibbs Case*, accords with its doctrine. We have since only once recognized and applied the doctrine of the *Gibbs Case*; and that was in *W. U. Tel. Co. v. Fuel*, 165 Ala. 391, 396, 397, 51 South. 571, but, with the overruling of its

[Western Union Tel. Co. v. Favish.]

predecessor, the *Fuel Case* must be taken as overruled to that extent. The contract involved in the *Gibbs Case* was single and indivisible, though to be partially performed in New York state, where made, and in Alabama, where completed performance could alone be accomplished.

"It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted as the footings upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country. * * *"—*Lloyd v. Guilbert*, 1 Q. B. 122, 123; 6 B. & S. 100, 133.

There was nothing in the subject-matter or in the circumstances of the *Gibbs Case* to alter or to avert the prima facie presumption that the law of the contract was intended by the parties to be the law of the place where it was made. There being nothing in the subject-matter or in the circumstances involved in or pertaining to the contract to transmit and to deliver the message to this plaintiff, to alter or to avert the application or the effect of the presumption that the parties engaged in Alabama, with reference to and regard for the laws of this state, it must be held that the contract was an Alabama contract, and was and is governed in respect of the consequences of its breach by the law of this state; and, in consequence, that in an action ex contractu for the breach of the contract, damages for mental distress, there being shown loss in estate, where of the elements of actual damages recoverable. So far as we are now advised, there is no federal enactment, touching interstate commerce, of which this message was a part, that exempts the contract in question from the stated operation and effect of our law where the breach thereof is the cause asserted.

(12-14) The first count, being ex delicto, is governed by a different principle, though with reference to it there is great conflict in the authorities. Our opinion is that the better rule is that stated by Justice Holmes in *Western U. Telegraph Co. v. Brown*, 234 U. S. 542, 547, 34 Sup. Ct. 955, 58 L. Ed. 1457. The cause of action in such cases is grounded in the breach of the obligation imposed by the law of the place where the tort is committed, and the measure and elements of the recovery for the wrong suffered

[Western Union Tel. Co. v. Favish.]

is that prescribed by the law of the place where the tort is committed. The tortious conduct declared on in the first count occurred in the state of Illinois, where, under the circumstances disclosed by this record, damages for mental distress were not recoverable. The deposition offered to establish this state of the applicable law in Illinois was hence relevant to the issue tendered, in part, by that count. But the deposition was offered without any specification or restriction of its appropriate purpose to avert the recovery of damages for mental distress in consequence of the tortious conduct declared on in the first count. It was inadmissible under the issues tendered by the second count, which was only for the breach of the contract. So, the deposition was of the species of evidence admissible for some purposes and inadmissible for others. The objection was general, and the court sustained it. Where evidence—admissible for one or more purposes, within the issues raised by the pleadings—is offered without restriction or limitation to the purpose for which it is admissible, and the objection is general, the judgment will not be reversed, whether the court sustains or overrules the general objection.—*Davis v. Tarver*, 65 Ala. 98; *Barfield v. Evans*, 187 Ala. 579, 65 South. 928; *Jones on Ev.* (2d Ed.) § 894, p. 1147; *Hurlbert v. Hall*, 39 Neb. 889, 58 N. W. 538; *Mine, etc., Co. v. Parke*, 107 Fed. 881, 47 C. C. A. 34. The distinction indicated was not observed in the framing of some of the special charges requested by and refused to the defendant. The case appears to have been tried without regard to the distinction. Error cannot be predicated on their refusal.

There was no error in instructing the jury that a prima facie case was made out by the plaintiff by showing that the message accepted for transmission by the company was not correctly transmitted and delivered.—*W. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 435, 25 South. 232, 82 Am. St. Rep. 89.

No reversible error appearing, the judgment must be affirmed.

Affirmed. All the Justices concur.

ON REHEARING.

(15) Upon the single ground, to be stated, the application for rehearing must be granted; and for this error the judgment must be reversed and the cause remanded. In the oral charge

[Louisville & Nashville R. R. Co. v. Davis.]

the court said to the jury: "Now, the plaintiff testified that he derived from that (i. e., the message delivered to him in Chicago) that his wife had been operated on."

The bill of exceptions purports to contain all of the evidence offered on the trial. According to this bill of exceptions, the plaintiff did not testify as the court told the jury; and in so incorrectly advising the jury upon a matter of evidence vital to the issue, the jury's province was invaded, and error to reverse was committed.

Reversed and remanded. All the Justices concur.

Louisville & Nashville R. R. Co. v. Davis.

Injury to Stock.

(Decided April 20, 1916. 71 South. 682.)

1. **Railroads; Injury to Stock; Burden of Proof.**—Where the action was against a railroad for injury to a horse, and the only negligence charged was "in running an engine into a horse" and there was no count relying on negligence as for frightening the animal and thereby causing the injury, the provisions of § 5476, Code 1907, were applicable, and the burden was not on plaintiff to show negligence on the part of the agent of the road, as would have been the case had the injury been caused by merely frightening the animal.

2. **Same; Instructions.**—In such an action an instruction putting the burden on plaintiff to reasonably satisfy the jury that defendant was operating the road, that it damaged the horse, and that, after plaintiff established his ownership and that the horse was damaged by the train, the burden was on defendant to show, and all the evidence would have to establish that defendant was not guilty of negligence in killing the horse, although possessing misleading tendencies when standing alone, was cured by instructions that the jury must believe, before plaintiff was entitled to recover, that defendant was responsible for the injury; that is, that its train ran into and injured the horse on account of the negligence of defendant, etc.

3. **Charge of Court; Misleading; Request.**—Where parts of the oral charge possessed misleading tendencies, they should have been removed by requested explanatory charges.

4. **Same; Inapt.**—Charges which are inapt to the evidence, are properly refused.

5. **Same; Covered by Those Given.**—It is not error to refuse requested instructions fully or substantially covered by instructions given.

APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

[Louisville & Nashville R. R. Co. v. Davis.]

Action by George Davis against the L. & N. R. R. Co. for damages for injury to a horse. Judgment for plaintiff and defendant appeals. Affirmed.

(Transferred from Court of Appeals under Acts 1911, p. 449.)

TILLMAN, BRADLEY & MORROW, for appellant. GOODWYN & ROSS, for appellee.

MAYFIELD, J.—(1) This action is to recover damages for injuries to plaintiff's horse. The only negligence alleged was in "running an engine into a horse." There was no count relying on negligence as for frightening the animal, and thereby causing the injury; hence the statute (section 5476 of the Code) was applicable to the case. And hence there was no error in the court's declining to charge the jury that the burden of proof was on the plaintiff to establish negligence on the part of defendant's agents—which would have been true if the injury had been caused from or in consequence of negligence in merely frightening the animal.—*Garth v. N. C. & St. L. Ry.*, 186 Ala. 145, 65 South. 166.

The trial court affirmatively instructed the jury that the plaintiff could not recover, unless they were reasonably satisfied from the evidence that the engine collided with the plaintiff's horse.

(2) The defendant excepted to the part of the oral charge which was as follows: "That puts the burden of proof upon the plaintiff to reasonably satisfy this jury that the defendant was operating this railroad as alleged, and that they damaged the horse of the plaintiff; if the plaintiff establishes the ownership of the horse, and this horse was damaged by the defendant's train, the burden would rest upon the defendant to show by the evidence, and all the evidence in the case would have to establish, after that, that the defendant was not guilty of any negligence in and about the killing of the horse."

This statement, standing alone, unquestionably possessed misleading tendencies, if it was not wholly erroneous; but taken in connection with other parts of the oral charge, and with the written requested charges given at the defendant's request, the excerpt is cured of its misleading tendencies, and of error, if such there be, inherent when it is considered alone. For example, the court in its oral charge instructed the jury that:

[Louisville & Nashville R. R. Co. v. Davis.]

"You must believe before the plaintiff is entitled to recover that the defendant is responsible for the injury; that is, its train ran into this horse, and injured it, on account of the negligence of the defendant."

The court also instructed the jury, at the request of the defendant, as follows: "(3) The court charges you that, unless you are reasonably satisfied from the evidence that plaintiff's horse was injured by being struck by defendant's engine, you must find for the defendant.

"(4) The court charges you that, if the defendant's engine did not strike plaintiff's horse, the burden of proof does not rest upon the defendant to acquit itself of negligence in and about the injuring of plaintiff's horse.

"(5) The court charges the jury that, unless you are reasonably satisfied by the evidence that defendant's train did come in actual physical contact with the plaintiff's horse, there would be no duty on defendant to exonerate itself of negligence."

(3) If the excerpt possessed other misleading tendencies, they should and could have been removed by requested explanatory charges.

It will be noticed that the statute says that the defendant must show that there was no negligence on the part of the company or of its agents. The phrase "all the evidence," standing alone, of course possessed misleading tendencies; but it could have been explained by requested charges—and in some respects it was so cured.

(4, 5) There was no error in refusing any of the defendant's requested charges. Each was either bad, inapt, or misleading, or was fully covered by other given charges. There was likewise no error in any of the rulings on the evidence.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Louisville & Nashville R. R. Co. v. Porter.]

Louisville & Nashville R. R. Co. v. Porter.

Injury to Person on Track.

(Decided February 3, 1916. Rehearing denied March 23, 1916.
71 South. 334.)

1. **Railroads; Persons on Track; Protection.**—A trespasser on a railroad track coming up the track to a crossing is not entitled to the protection or care required of a railroad as to persons using the crossing.

2. **Negligence; Wanton.**—Wanton negligence rests upon the wrongdoers just apprehension of a probability of untoward consequences of his act.

3. **Railroads; Persons on Track; Wantonness.**—Evidence that a trespasser was run down in the day time by a slowly moving train near a station where people were frequently on the track during the day does not justify the submission of wanton negligence.

4. **Same; Trespassers.**—Where a person for his own purposes catches a freight train for a ride thereon, and on alighting therefrom walks on down the track to the station, he is a trespasser.

5. **Same; Burden of Proof.**—The burden of proof of negligence or wantonness which results in killing a person is on plaintiff throughout the case, if the person killed be a trespasser.

APPEAL from Blount Circuit Court.

Heard before Hon. J. E. BLACKWOOD.

Action by John Porter, Administrator, against the L. & N. R. R. Co. for damages for the death of his intestate, while on the track. Judgment for plaintiff and defendant appeals. Reversed and remanded.

WARD & WEAVER, and M. L. WARD, for appellant. ERLE PETTUS, for appellee.

SAYRE, J.—Plaintiff (appellee) sued in two counts, charging: (1) That defendant's servants or agents wantonly or willfully ran or propelled a locomotive engine upon or against plaintiff's decedent, thereby killing him; and (2) that defendant's servants or agents negligently ran or propelled the engine upon or against plaintiff's decedent after his peril was discovered by one of them, thereby killing him. Defendant has appealed. We entertain the opinion that the result of the trial cannot be sustained.

[Louisville & Nashville R. R. Co. v. Porter.]

Defendant has a station and two tracks, main line and siding or house track, at Blount Springs. The main line is located to the west, the house track between it and the depot. The depot is to the east of the tracks, which are straight and nearly level for a considerable distance north and south. The spaces between and around the tracks and rails are filled to a practical level with cinders, above which only the rails appear. A north-bound freight train had stopped on the house track some distance south of the depot, where its engine was detached and moved north beyond the depot to shove a cattle car onto a spur track and out of the way. Doing this, it passed a cattle pen where plaintiff's decedent was on some business. This cattle pen was about 200 feet north of the depot. Another freight train, moving south on the main line, had stopped at the water tank just across the tracks from the cattle pen. While the detached engine was in the neighborhood of the spur, the south-bound train moved to the south. Plaintiff's decedent got upon this train, several car lengths back from the engine, and rode down to a point nearly opposite the depot office, where he alighted between the tracks some 30 or 35 feet from the place where he was killed a few moments later. He moved obliquely over toward the office door; but, when he reached the middle of the house track, he turned and started walking along that track to the south. At that time the detached engine was about 60 feet away, moving back to its train. Deceased had gone only a little way along the track, 15 to 20 feet, when the detached engine struck him from behind and killed him. The weight of the evidence goes to show that the engine was moving about 5 or 6 miles an hour; the witness who testified to the highest rate of speed said it was moving 6 or 8 miles an hour. The evidence was in conflict as to whether any signals of approach were sounded as the engine backed.

(1) In view of the fact, previously established and at no time denied, that deceased was walking along the track and not across it, all that evidence which was intended to show that people from the Mulberry neighborhood used a footpath over Duffy's Mountain and a footbridge across a little creek near the railroad by which they approached and crossed defendant's tracks from the west was irrelevant and calculated to work injury to the defense against the first count of the complaint. Deceased was not crossing the track according to the custom of

[Louisville & Nashville R. R. Co. v. Porter.]

the Mulberry folks, and notice of what he was doing was not to be brought home to the defendant's agent in charge of the locomotive by knowledge of the wholly different thing customarily done by them; and besides, at the time in question, the south-bound train was in the way, so that the Mulberry folks, approaching the railroad from the west, as plaintiff's decedent approached the house track, could not cross. Defendant's objection to plaintiff's question about the footpath that crossed the track and went over the mountain to the west should have been sustained.—*Southern Ry. Co. v. Drake*, 166 Ala. 540, 51 South. 996; *Southern Ry. Co. v. Stewart*, 179 Ala. 304, 60 South. 927. This evidence was, of course, totally irrelevant to the specific issue of subsequent negligence raised by the second count of the complaint.

(2, 3) The verdict in the case, if it is to be referred to the first count of the complaint, may be explained under the evidence on the following hypothesis of facts: That the engineer became actually aware of the presence of deceased upon the track and should have known in the exercise of due caution that deceased was not conscious of the approach of the engine, and thereafter the engineer consciously omitted to do something that his reason told him he ought to do, something that perchance might have averted the disaster—an hypothesis of technical possibility under some phases of the evidence. This would exclude error in the refusal of the general charge requested by defendant. But in its concrete illustration of wantonness such as would justify a verdict against defendant under the first count, the court dealt with wrong of a character different from that to be inferred from the facts we have mentioned as being of possible finding from the evidence. It dealt exclusively with that character of wrong which rests upon an inference of reckless indifference to the probable consequences of a probable situation, the wrongdoer, the engineer, in this case, being charged with knowledge, not that some person is at the time in a position of actual, imminent danger, but with knowledge, based upon previous observation or information, of the probability that some person will be exposed to danger by his manner of operating the engine. Wrong of this sort has been properly characterized as the equivalent of universal malice; to its existence the specific intent to injure any particular person is not essential.—*Weatherly v. N. C. & St. L. Ry. Co.*, 166 Ala. 575, 51 South. 959. This

[Louisville & Nashville R. R. Co. v. Porter.]

court has frequently held that to the implication of wantonness it is essential that the act done, or omitted, should be done or omitted with a knowledge and a present consciousness that injury will probably result.—*L. & N. R. R. Co. v. Brown*, 121 Ala. 226, 25 South. 609. Wantonness of that character is the moral and legal equivalent of intentional wrong, and rests upon the just apprehension, with which the wrongdoer is charged, not of a mere possibility, but of a probability, a likelihood, that untoward consequences will ensue to some one, and this probability, this likelihood, must have support and foundation in a reasonable interpretation of the evidence. Eliminating the testimony in respect to the custom of the Mulberry folks, which under the circumstances was entitled to no consideration, the only evidence lending color or semblance of support to the hypothesis of wantonness in the sense of universal malice was, to quote the language of the witness, that "people were on the track at the point where the accident occurred frequently, all during the day." In view of the undisputed evidence that the engine was run in the daytime, and not in excess of 8 miles an hour, this evidence was too vague and indefinite to sustain the charge, even though the engine was backed without signals of approach along by the side of a village of not exceeding 200 inhabitants. That part of the court's oral charge assigned for error and which undertook to define "wantonness" such as may be inferred from the customary presence of people on the track was misleading and erroneous as authorizing the jury to believe there was in the evidence such an issue for their decision.

(4, 5) Clearly, the deceased was a trespasser upon the track, and defendant owed him no original duty to know he was there; but if the engineer was apprised of the presence and peril of deceased upon the track in time to save him by the prompt use of any means at his command, and thereupon negligently, willfully, or with conscious indifference to the probable consequences of the situation thus known to him, omitted to do what he might have effectually done to save deceased, then defendant was liable under the first or second count of the complaint, according as the jury may have found that the engineer intended to kill plaintiff's decedent or was consciously indifferent to that result on the one hand, or that his omission was the result of more inadvertence on the other. These were the true issues made by the pleading and the evidence, and to these questions of fact the con-

[Louisville & Nashville R. R. Co. v. Lynne.]

sideration of the jury should have been limited.—Cases cited first above. The burden of proof as to both counts was upon the plaintiff throughout the case.—*Carlisle v. A. G. S. Ry.*, 166 Ala. 591, 52 South. 341; *L. & N. R. R. Co. v. Jones*, 192 Ala. 532, 67 South. 691; *L. & N. R. R. Co. v. Rayburn*, 192 Ala. 494, 68 South. 356; *Empire Coal Co. v. Martin*, 190 Ala. 169, 67 South. 435.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Louisville & Nashville R. R. Co. v. Lynne.

Injury to Goods.

(Decided February 3, 1916. Rehearing denied March 30, 1916.
71 South. 338.)

1. **Carriers; Goods; Connecting Carrier.**—The Carmack Amendment (U. S. Comp. Stat. 1913, § 8592) does not abrogate or impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by state statutes or decisions.

2. **Same; Connecting; Burden of Proof.**—Where the action is against a terminal carrier for loss of goods, the burden is on plaintiff to show that his goods were lost or diverted while in the custody of defendant.

3. **Same.**—Where it is shown that defendant railroad delivered to plaintiff a part of the original shipment, the presumption arises of its receipt by defendant railroad in the same condition as when delivered to the initial carrier and imposes upon defendant railroad the burden of showing that the missing goods were not lost while in its custody.

4. **Same; Hearsay.**—In such a case the declaration of a depot agent that the goods were short, and would arrive, is but hearsay, and not a verbal declaration within the scope of duty then being performed.

5. **Same; Evidence.**—Where the clerk did not see the car opened his testimony that at the point of delivery to defendant the car was found short of the goods complained of, was not sufficient to overcome a presumption that the missing goods came into defendant's possession.

6. **Same.**—Where the suit was for loss of goods by a carrier, the admission in evidence of the declaration of a depot agent that the goods were short, and would arrive, while technically erroneous was not prejudicial to a reversal.

APPEAL from Morgan Circuit Court.
Heard before Hon. D. W. SPEAKE.

[Louisville & Nashville R. R. Co. v. Lynne.]

Action by W. E. Lynne against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 449. Affirmed.

The plaintiff shipped 20 cases of dry goods from New York City to himself as consignee at Hartselle, Ala. The initial carrier was a steamship line which delivered the goods to the Southern Railway Company at Charleston, S. C., and it in turn delivered the shipment to defendant in a sealed car at Montgomery. From this point the car, with its seal unbroken was carried to Birmingham by the defendant, where the seal was broken, parts of the contents removed, other goods loaded to complete the carload, the car resealed, and thence carried by defendant to Hartselle. At this point the shipment was delivered to plaintiff as consignee. One Reader, checking agent of defendant at Birmingham, testified that when the car was opened at Birmingham he checked over this shipment, and found it short one case of dry goods, and found another case recoopered. This shortage and condition was noted by him on the waybill issued by him for defendant when the shipment was checked and sent on its way to Hartselle. Nineteen cases, included the recoopered case, were delivered to plaintiff, and he found the recoopered case short a large part of its original contents. Plaintiff introduced in evidence the steamship's bill of lading showing receipt and shipment of 20 cases of his goods. The defendant introduced in evidence the waybill issued by the Southern Railway, showing receipt and transshipment over its lines of these same 20 cases from Charleston to Birmingham. Defendant also introduced its own waybill from Birmingham to Hartselle, indorsed with the notation of shortage and condition as above stated, which was verified by the testimony of the checking agent. The defendant objected to the introduction in evidence of the steamship bill of lading on the ground that it was not signed by the carrier, and was not shown to be genuine, and the objection was overruled. Defendant also objected to the testimony of plaintiff that he told defendant's agent at Hartselle that "I would have to bring suit for the goods, and he requested me to wait a few days, maybe he would find it, and to give them a little more time;" and "he mentioned about the goods being short, that they would come the next day or two." These objections were

[Louisville & Nashville R. R. Co. v. Lynne.]

overruled. The trial judge refused to give the general affirmative charge for defendant, and also a written request to charge the jury that plaintiff could not recover of this defendant for the lost case. The following charges were also refused to defendant:

(1) The initial carrier is liable for the loss of goods when lost upon any road between the point of shipment and delivery, but connecting carriers are only liable for loss proved to have occurred while the goods were in possession of such connecting carrier.

(2) If you believe from the evidence that the shipment sued on was an interstate shipment, and that the Clyde Steamship Company was the initial carrier of said shipment, and this defendant a connecting or delivering carrier of such shipment, and if you further believe a portion of said shipment was lost, I charge you the Clyde Steamship Company would be liable therefor, and not this defendant.

EYSTER & EYSTER, for appellant. WERT & LYNNE, for appellee.

SOMERVILLE, J.—(1) The act of Congress known as the Carmack Amendment of the act of June 29, 1906 (Fed. St. Ann. Supp. 1909, pp. 273, 274), although it prescribes and extends the liability of initial carriers of interstate shipments, does not abrogate nor in any way impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by the statutes or decisions of the several states. That act makes the initial carrier responsible for the safe delivery of shipments over connecting lines, no matter where the loss may occur, but it certainly does not exempt connecting lines from direct responsibility to the owner for their own failure to safely carry and deliver goods received by them for that purpose.

(2) This being the liability of defendant in this case, the burden was on plaintiff to show that his goods were lost or diverted while in the custody of defendant.

(3) By showing defendant's delivery to him of a part of the original shipment, a presumption arose of its receipt by defendant in the same condition as when delivered to the initial or a preceding carrier, which imposed upon defendant the burden of showing that missing goods were not lost while in its custody.—*South. Exp. Co. v. Saks*, 160 Ala. 621, 49 South. 392.

[Louisville & Nashville R. R. Co. v. Lynne.]

With respect to the missing case, we are of the opinion, on the undisputed evidence, that defendant fully discharged this burden, and that the jury should have been instructed, as requested, that plaintiff could not have of defendant any recovery therefor. This conclusion cannot, however, be affirmed as to the contents of the recoopered box, and the time and place of their loss was a question for the jury under the evidence. The charge which affirmed the liability of the initial carrier and the exemption of defendant, regardless of where the goods were lost, was properly refused.

The other special charge (1) correctly stated the law as to the liability of connecting carriers, but, as it was fully covered by other given charges, its refusal was not error.

(4) The declaration of the Hartselle depot agent that the goods were short and that they would come in the next day or two was but hearsay, and was not admissible as a verbal act within the scope of a duty then being performed. It should have been excluded, though its erroneous admission might not alone be a reversible error in this case.

Let the judgment be reversed, and the cause remanded.
Reversed and remanded.

ANDERSON, C. J., and GARDNER and THOMAS, JJ., concur.

ON REHEARING.

SOMERVILLE, J.—(5) On the original hearing we held that defendant had overcome the presumption that the missing case of goods came into its possession as carrier; this because defendant's checking clerk at Birmingham testified to that effect. Upon a careful consideration of his entire testimony, however, it appears that he did not *know* the fact stated, since he did not see the seal clerk break the car seal, and did not know how long it had been broken before he checked the contents of the car and discovered that a case was missing; thus leaving an interim during which so far as appears, the case may very well have been abstracted from the car while in defendant's custody at Birmingham. Such an inference we now think it was within the province of the jury to draw, and we are impelled therefore to hold that the affirmative charge for defendant as to liability for this case, was properly refused.

(6) While we still hold that the admission of the declaration of the depot agent at Hartselle was technically erroneous, yet we

[Alabama Great Southern Ry. Co. v. Skotzy.]

are convinced that its admission could not and did not influence the jury in arriving at their verdict, and we will not reverse the judgment for that insignificant error.

It results that the application must be granted, and the judgment of reversal set aside, and the judgment appealed from will be now affirmed.

Affirmed.

Alabama Great Southern Ry. Co. v. Skotzy.

Injury to Servant.

(Decided February 3, 1916. Rehearing denied March 23, 1916.
71 South. 335.)

1. Master and Servant; Injury to Servant; Assumption of Risk.—The defense of assumed risk cannot be availed of under the general issue, but must be made the subject matter of a special plea.

2. Commerce; Interstate; Federal Liability Act.—Where the plaintiff was engaged as a railroad fireman in a crew making up interstate trains, and was injured during a temporary lull in the work in which he was engaged, he was engaged in interstate commerce when injured, and his case was properly brought under the Federal Employer's Liability Act.

3. Master and Servant; Injury to Servant; Jury Question.—Evidence that while plaintiff, a fireman, stood on an adjacent truck in order to work, another crew switched some cars with no one controlling them, and no warning signal into the cars on that track which ran over plaintiff and injured him, and that the switching foreman could have seen plaintiff or his crew, was sufficient to warrant a submission to the jury of the question of negligence.

4. Same; Contributory Negligence.—Where there was nothing to indicate that the cars on the track on which plaintiff was standing when injured, would be moved during the time he was there engaged, evidence that cars ran over plaintiff who was standing on a track adjacent to the engine on which he was working to straighten his flue auger between the wheels of his engine, was sufficient to warrant a submission to the jury of the question of contributory negligence.

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Action by A. K. Skotszy against the Alabama Great Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion. The following are the charges referred to: (5) Unless you are reasonably

[Alabama Great Southern Ry. Co. v. Skotzy.]

satisfied from all the evidence in this case that it was the duty of the crew of engine No. 114 to give notice of the fact that they proposed or intended or were about to kick a car or cars on the track on which plaintiff was standing, then you must find a verdict for defendant.

(9) If you believe the evidence in this case, the court charges you that plaintiff is guilty of contributory negligence.

A. G. & E. D. SMITH, for appellant. HARSH, HARSH & HARSH, for appellee.

GARDNER, J.—(1) Appellee recovered a judgment against appellant for injuries received while in its employ as fireman on one of its engines in the yards of said railroad in Birmingham. The complaint contained but one count, declaring for simple negligence, and was under the federal Employers' Liability Act. The cause proceeded to trial upon the plea of the general issue and the plea of contributory negligence. Much stress is laid in argument for appellant upon the question of assumption of risk, and authorities of other jurisdictions are cited to the effect that such a defense need not be specially pleaded. There is no plea setting up that character of defense in this case. The question as to whether or not a special pleas is necessary was set at rest in this state by the following language found in *Foley v. Pioneer Mfg. Co.*, 144 Ala. 182, 40 South. 274: "Assumed risk, when set up as a defense, is subject-matter for a special plea. There is a well-defined distinction between assumption of risk and contributory negligence, still both of these defenses are in confession and avoidance of the plaintiff's action, and cannot be availed of under the general issue, but must be specially pleaded."

The holding in the *Foley Case* was reaffirmed in the more recent case of *Mobile Elec. Co. v. Sanges*, 169 Ala. 341, 53 South. 176 Ann. Cas. 1912B, 461. See, also, in this connection *King v. Woodward Iron Co.*, 177 Ala. 487, 59 South. 264.

(2) It is next insisted by counsel for appellant that the plaintiff is not shown under the evidence to have been engaged at the time of the injury in interstate commerce, and that therefore as the complaint was made under the federal Liability Act there was a fatal variance entitling the defendant to the affirmative charge. It may be seriously questioned that appellant is in position to raise this question on this appeal, for the reason that it ap-

[Alabama Great Southern Ry. Co. v. Skotzy.]

pears from the record that the court in its oral charge to the jury stated that there was no dispute or controversy between the parties that defendant and the plaintiff were engaged in interstate commerce at the time of the injury, and that they need spend no time "on questions which both sides admit." No objection or exception was taken to this portion of the charge, which seems to have been repeated in substance. It would therefore appear that the trial was had upon that theory of the case.—*L. & N. R. R. Co. v. Holland*, 173 Ala. 696, 55 South. 1001. Brushing aside this consideration (and without determining the same), we prefer to rest our conclusions upon the real merits of the question as presented by the evidence. As previously stated, the plaintiff was employed as a fireman on one of the engines—No. 117—of defendant's railroad. The crew of which he was a member was, at the time of the injury, "making up trains." Quoting from the plaintiff: "The crew and myself were using that engine for making up a train to go south, to go as far south as Meridian, Miss. * * * Yes, sir; these cars that were dropped down and run over me were being made up into a train to go to Meridian, Miss."

At the time of the injury the engine on which plaintiff was fireman was standing still, and the plaintiff was in the act of cleaning out the flues (a part of his duty) with the flue auger. The crew had stopped, temporarily, to go up to the yard office for some purpose not disclosed, and the evidence for plaintiff tends to show that he merely took advantage of this temporary lull in the work of making up the train to blow out the flues of his engine. This is further indicated by his testimony, where he says: "We were going to go back at making up the through train." The answer of the defendant to interrogatories propounded by the plaintiff shows that "engine No. 117 was standing still at the time the accident occurred, but had been handling or switching in the Birmingham yard cars loaded with interstate freight on the day plaintiff was injured." One Gladden, witness for defendant, and who was in charge of said engine No. 117, testified:

"All that day we were switching cars in the yard, * * * making up trains to go south, to go to Meridian, Miss. The other crew were switching cars in there to go south. * * * We were both switching in the same yard, making up trains, Meridian, Miss., trains."

[Alabama Great Southern Ry. Co. v. Skotzy.]

The evidence for plaintiff further tended to show that the cleaning out of flues was necessary to make the engine steam and do its proper work. There seems to be no insistence by appellant's counsel that defendant was not engaged in interstate commerce, but the argument is devoted to the proposition that the plaintiff was not so engaged at the time of his injury. In the case of *Pederson v. Del., Lack. & West. Ry.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, it was said: "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

The plaintiff was engaged as a member of a crew at the time of the injury, making up a train to go to Meridian, Miss. A fair inference from the testimony as above indicated would be that there was a temporary lull while some of the crew went to the yard office for some purpose, and the work of making up the trains had not been completed. We deem a discussion of the cases cited by counsel for appellant unnecessary, as we think the principles which controlled the court in the case of *N. C. & St. L. v. Zachary*, 232 U. S. 248, 34 Sup. St. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, are conclusive in this case against the contention of appellant. See, also, the *Pederson, etc.*, *Case, supra*; *Roberts on Injuries to Interstate Employees*, § 35, and cases there cited; *L. & N. R. R. Co. v. Carter*, 195 Ala. 382, 70 South. 655; *Pittsb., C. & St. L. Ry. v. Glinn*, 219 Fed. 148, 135 C. C. A. 46; *N. C. & St. L. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554. We are of opinion that the case was properly brought within the influence of the federal Liability Act. There is nothing in the case of *L. C. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, cited by counsel for appellant, which in the least militates against the conclusion here reached. In that case the employee was engaged in moving cars from one part of the city to another, all of which were loaded with intra-state freight.

(3) It is next insisted that the defendant was entitled to the affirmative charge, for the reason that no negligence was shown on the part of any employee or servant of the defendant company.

[Alabama Great Southern Ry. Co. v. Skotzy.]

It appears from the evidence that near to and parallel with the track on which plaintiff's engine was standing was another track, on which were two unconnected cars. Plaintiff insists that the engineer instructed him to clean out his flues, and that he got off his engine and found the flue auger was bent. He placed the auger between the driving wheels of the engine in order to straighten it, and in doing so placed himself on the parallel track where the idle cars were standing. The flue auger was of steel, about 12 feet long and 1 inch in diameter, and plaintiff being at one end of the auger for the purpose of straightening it, placed him on the opposite track. Plaintiff testified that straightening the auger in this way required only a minute or two, and that the accident "happened in that minute or two." While he was thus in the act of straightening the auger, the other crew, which was also engaged in switching cars to make up a south-bound train, ran some cars into the ones standing idle, and caused them to knock down and run over plaintiff and injure him. The cars thus dropped down were cut off from the control of the engine and turned loose. The witness Fuller, who was foreman of the switch engines and with the crew that cut off these cars, testified that he did not put any one, or cause any one to be, on these cars when they went down and bumped into the other cars. He said:

"I just threw them down by themselves. * * * Without anybody on them; they ran in that condition about 7 car lengths; it was a gradual down grade, going north. * * * When they left our engine * * * the train was going about three or four miles an hour. * * * They increased their speed until they struck the other cars. * * * It did not stop them. They are not supposed to stop, knock them on down in the clear; clear the switching lead. * * * On that occasion I turned those cars loose to bump against two standing cars, * * * with the knowledge that the two standing cars would not stop them, and that the standing cars would be bumped, and might run about as far as 20 car lengths, * * * without any control at all. * * * I knew that this engine Skotzy was fireman of was standing on the next track. * * * I knew that when I cut the cars off. * * * It was daylight there; I could see those cars. I was about 7 car lengths away from Skotzy's engine. A car length is about 36 feet. * * * I was about 252 feet away. * * * I could see everything perfectly plain. And I did look down to see."

[Alabama Great Southern Ry. Co. v. Skotzy.]

The witness further testified that the two tracks were straight and close together, but stated that from where he stood he could not see down between the tracks to the engine. There was evidence tending to show that no signal or warning was given at the approach of these cars, and we are of the opinion that there was sufficient testimony from which the jury could infer that the witness Fuller could or did see plaintiff, or that at least he was looking ahead down the track and could have seen, and did see, the auger protruding from the engine and entirely across the space between the engine and in front of the standing cars.—*So. Ry. Co. v. Shelton*, 136 Ala. 191, 34 South. 194.

Much of the argument of appellant's counsel seemed to rest upon the theory that the defendant owed plaintiff no duty to keep a lookout or to give any signal of approach. The evidence for the plaintiff tends to show that in switching the cars the crew, to quote the witness, "is supposed to look out and see if anybody is on the track," and "it was a rule not to move cars without a signal." In *L. & N. R. R. Co. v. Thornton*, 117 Ala. 274, 23 South. 778, the following charges were held properly refused: "(8) I charge you that the brakeman on the car that ran over plaintiff was only required to keep such a lookout as a reasonably prudent man would have kept in performing the duties of a brakeman, and he was not required to keep a special lookout for persons lying on the track. (10) I charge you that it was not the duty of the brakeman on the car that ran over plaintiff to keep a lookout for human beings on the track in front of his car."

The facts in the *Thornton Case* bear some analogy to those here under consideration. Speaking to the ruling of the court in refusing charges 8 and 10, above quoted, the court said:

"This brakeman was, for the time, so to speak, the engineer of the descending car. He, and no other person had control over it, and that was his duty. It has been held that engineers, or persons in control of an engine or car, 'should always be on the lookout for obstructions (whether of persons or things), and, when discovered, no matter when or where, should use all the means within their power to escape the impending danger, or to avert the threatened injury; and less care than this is not due diligence.'—*S. & N. Ala. R. R. Co. v. Williams*, 65 Ala. 78. The rule of the company required each employee * * * to look out after, and be responsible for, his own safety, as well as to

[Alabama Great Southern Ry. Co. v. Skotzy.]

exercise the utmost caution to avoid injury to his fellow servants, especially in the switching of cars, and in all movements of trains.' The injury to plaintiff occurred in the nighttime, in the switching yard of defendant in the city of Birmingham, which was interlaced with switch tracks. If true, as the charges postulate, that the brakeman was under no duty to keep a special lookout for persons on the track, yet, if a proper lookout for obstructions of any kind, which he was bound to keep, would have revealed a person on it, in a perilous condition, the duty would have arisen to save him if practicable. The charges were calculated to confuse and mislead the jury. The question of negligence or not, as averred in the complaint, was, under all the surrounding circumstances, one proper for the determination of the jury, under proper instructions."

We are of the opinion that the question of negligence was one for the jury.—*Randle v. B. R. & P. Co.*, 158 Ala. 532, 48 South. 114. An examination of the case of *Johnson v. N., C. & St. L. Ry.*, 177 Ala. 284, 58 South. 447, cited by counsel for appellant, discloses that there was no ruling by a majority of the court in that case that no negligence was shown.

Charge 5, requested by defendant, was properly refused. If not bad for other reasons, its refusal could be properly based upon the fact that it fails to take into consideration any duty on the part of the servants of the defendant to look out for obstructions on the track (*L. & N. R. R. Co. v. Thornton, supra*), or to give warning after the discovery of plaintiff's perilous situation.

(4) Charge 9 was also properly refused. It is misleading, in that it makes no reference to the fact that the negligence of the plaintiff must be such as proximately to contribute to his injury. It seems to be further incomplete in failing to instruct the jury as to the result of the finding in this particular case. We are further of the opinion that the contributory negligence of plaintiff was, under the evidence in this case, a question for the jury. There was evidence tending to show that in straightening the auger—which was a part of his duty—while the cars were standing disconnected on the opposite track, there was nothing to indicate that they would be struck or moved during "the minute or two" that he was so engaged. As to whether the conduct of the plaintiff in so placing himself in a dangerous position was such as to make him guilty of such negligence as proximately

[Central of Georgia Ry. Co. v. Mathis.]

contributed to his injury was a question properly submitted for the determination of the jury.

We have dealt with each of the questions presented by counsel for appellant, although we have not commented upon the several authorities of other jurisdictions cited by counsel in their brief, as we deem the case ruled by the decisions of our own court herein noted, and by those cited from the Supreme Court of the United States.

Finding no reversible error in the record, the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Central of Georgia Ry. Co. v. Mathis.

Injury to Passenger.

(Decided April 20, 1916. 71 South. 674.)

1. **Carriers; Passenger; Complaint.**—Counts of the complaint averring the relationship of passenger and carrier between plaintiff and defendant, and charging that after plaintiff reached her destination, the train of defendant on which she was being carried did not stop a reasonable length of time for her to alight, and that while she was near one of the steps of the coach, one of the servants of defendant recklessly, wantonly and intentionally injured plaintiff by taking hold of her and pulling her off the train, while it was in motion, charged wanton negligence, and was not objectionable as charging both wantonness and simple negligence.

2. **Same; Replication; Demurrer.**—Where defendant set up contributory negligence in that the train stopped a sufficient length of time at said station to allow passengers to alight or embark, the plaintiff failed to get off the train at her destination, although she knew it had been reached, but after the train was put in motion she ran out of the train and jumped from the step, falling and receiving injuries; and another plea averring the same facts, and that though warned, plaintiff jumped from said train, a special replication to both pleas alleging that plaintiff's acts were done as a result of the invitation, direction or request of the servant of defendant, was not demurrable, or if demurrable, the sustaining of the demurrer thereto was not reversible error, the replication being good as to the first plea, and merely denying the special averments of the second plea, which denial the plaintiff had the benefit of under the general replication.

3. **Appeal and Error; Harmless Error; Evidence.**—Where it appears that the witness subsequently answered the question, and that the answer was received without objection, any error in refusing to allow such a question to the witness was rendered harmless.

[Central of Georgia Ry. Co. v. Mathis.]

4. Same.—A carrier cannot complain of the receipt of testimony that the suing passenger did not know, at the time of the injury, what she was talking about, as such testimony tended to support the contention of the carrier that such passenger was drunk.

5. Carriers; Passengers; Alighting; Negligence.—Where plaintiff contended that when she alighted from the moving train she did so at the request and with the assistance of the porter on the train, the court could not, as a matter of law, declare such act contributory negligence, since whether one is guilty of negligence in voluntarily alighting from a moving train depends on the circumstances surrounding the parties at the time, the speed of the train, etc.

6. Same.—Where the passenger claimed that she was not notified that the train had reached her destination, and hence, had to alight while it was in motion, a charge asserting that a railroad company is not required to stop beyond a reasonable length of time to allow passengers to alight was inapplicable as omitting the question whether plaintiff knew that the train had reached her destination.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by Ella Mathis against the Central of Georgia Railway Company, for damages suffered while a passenger. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals under Acts 1911, p. 449, § 6. Affirmed.

Count A alleges the relationship of passenger and carrier between plaintiff and defendant, and that while such passenger the defendant then and there so negligently conducted itself in its said business that by reason of said negligence, plaintiff received certain injuries, which are set out. Count B alleges the negligence and carelessness of defendant's agents, servants, or employees in charge of the train on which plaintiff was a passenger, and, as a proximate result, injuries to plaintiff. Count C, after alleging the relationship of passenger and carrier between plaintiff and defendant, sets up that: After plaintiff had reached her destination, defendant's train on which she was being carried did not stop a reasonably sufficient length of time for her to alight from said train, and that while she was on the platform on or near the steps of the coach on which she was being carried, one of defendant's servants, agents, or employees on said train, to-wit, the porter, recklessly, wantonly, or intentionally injured plaintiff by taking hold of her and pulling her off of said train while same was in motion, and thus bruised and injured plaintiff. [Here follows catalogue of injuries.]

Count D alleges that plaintiff was injured internally and externally, and bruised, etc., as a direct result of the reckless and

[Central of Georgia Ry. Co. v. Mathis.]

wanton or intentional injury inflicted on plaintiff by defendant's porter, who was, at the time, one of defendant's servants, agents, or employees in charge of defendant's train. Special pleas to counts A and B are as follows: Contributory negligence, in that said train on which plaintiff was a passenger made the usual and customary stop at said station of sufficient duration to allow passengers destined for that station to alight from said train in safety, and to allow all passengers to get aboard said train at said station who desired to do so; that plaintiff failed to get out of said train at Malvern, her destination, when the same stopped at said station, and while the same was standing for that purpose, although she knew that said station of Malvern had been reached, but after said train was put in motion and was moving away from said station, plaintiff ran out of said train and jumped from the steps thereof to the ground and fell, thus causing the injuries complained of.

Plea 3 alleges the same state of facts, with the additional averment that: Before plaintiff attempted to and did jump from said train, she was warned not to do so, but to wait, and said train would be brought to a stop, and plaintiff given an opportunity to get off in safety, but plaintiff declined to heed such warning, and jumped from said train while it was in motion.

The special replication 2 to pleas 2 and 3 is as follows: Plaintiff's acts and movements as alleged in each of said pleas occurred and were done as a result of the invitation, direction, or request of one of defendant's servants, agents, or employees in charge of said train on the occasion in question.

The following charges were refused to defendant: (2) The court charges the jury that when plaintiff's destination was reached, and the train stopped, it was her duty in law to retire from said train with reasonable diligence and dispatch, and if she failed to do so, and remained on said train until the same was put in motion, and was moving away from said station, and, while it was in motion, jumped off, by such act plaintiff took the risk of the peril involved in the venture, and she cannot recover in this suit.

(8) The court charges the jury that in no case can a recovery be had if the injury complained of is the result of the mutual negligence of both parties. In this case, if plaintiff remained on the train at Malvern and did not attempt to get off while the same was standing for that purpose, but waited until the train

[Central of Georgia Ry. Co. v. Mathis.]

was put in motion, and then jumped off of her own motion, and received the injuries complained of, she cannot recover in this suit, however greatly she may be injured, although the defendant may have been negligent in not allowing the train to remain at the station until it was known that all passengers from said station had retired from the train.

(7) The law does not require defendant company to stop at a station for the discharge of passengers beyond what would be a reasonable length of time to enable passengers for said station to alight, by the exercise of ordinary diligence on their part, and the law does not impose on the conductor in charge the duty of seeing and knowing that all the passengers intending to do so have alighted. Unless he knows or had good reason to believe to the contrary, he may act upon the presumption that passengers have availed themselves of the ample time allowed and gotten off the train.

BENJAMIN F. REID, for appellant. CHARLES D. CARMICHAEL, for appellee.

ANDERSON, C. J.—(1) While we do not commend counts C and D of the complaint as models of good pleading, or hold that they would not be subject to appropriate grounds of demurrer, if interposed, argued, and insisted upon on appeal, we do not think that either of said counts was subject to the ground of the demurrer argued and insisted upon in brief of appellant's counsel, that is, "They count upon simple negligence and wanton negligence." We think that each of said counts charges willful or wanton misconduct as the proximate cause of the plaintiff's injury.

(2) The trial court did not commit reversible error in overruling the demurrer to plaintiff's second replication to special pleas 2 and 3 to counts A and B of the complaint. The replication 2 was but a denial of a material part of plea 3, which charged that the plaintiff did the things charged, after being warned not to do so, but this would not prevent her from setting up the fact specially, though the trial court would not have committed reversible error in sustaining the demurrer to the replication to said plea 3, as the plaintiff could have gotten the benefit of same under the general replication. The said replication 2 set up good matter in confession and avoidance of special plea 2.

[Central of Georgia Ry. Co. v. Mathis.]

(3) Whether the trial court did or did not err in not letting the defendant ask the witness Ella Shivers, whom the plaintiff was standing there talking with when she (witness) got up and jumped off the train, matters not, as the witness seems to have subsequently answered the question, and which was not excluded. She said: "As I started out of the train I heard plaintiff speak a word or two to somebody, but I don't know who it was. I never did look back to see."

(4) The defendant cannot complain because the witness Ella Shivers testified, in response to the plaintiff's question as to the mental condition of plaintiff, that at the time she (the plaintiff) did not know what she was talking about. This tended to establish the defendant's contention that the plaintiff was drunk or drinking. Moreover, the fact that she did not know what she was talking about at the time had a tendency to weaken the accuracy of the plaintiff's evidence, which had been unfavorable to the defendant.

(5) Charges 2 and 8, refused the defendant, in effect instruct as matter of law that the plaintiff was guilty of contributory negligence for voluntarily stepping or jumping off the moving train. While there are circumstances under which the court could say, as matter of law that a person would be negligent in stepping or jumping from a moving train, depending largely upon the rate of speed the train was going, whether day or night, the surrounding conditions, and whether or not incumbered with bundles, etc. (*Hunter v. L. & N. R. R. Co.*, 150 Ala. 594, 43 South. 802, 9 U. R. A. [N. S.] 848), yet it was for the jury to determine in the case at bar, whether or not the plaintiff was guilty of negligence in getting off of the train, which was not moving rapidly and it being broad daylight. Moreover, the porter was standing near—some of the evidence shows that he had hold of her—and the jury could infer that the act of getting off was not necessarily dangerous and negligent.—*Birmingham R., L. & P. Co. v. Girod*, 164 Ala. 20, 51 South. 242, 137 Am. St. Rep. 17; *Sou. Ry. Co. v. Morgan*, 178 Ala. 590, 59 South. 432.

(6) Charge 7, refused the defendant, was refused without error, for the reason that, if not otherwise faulty, it pretermits a knowledge on the part of the passenger of the arrival of the train at the destination station, or a proper warning as to the approach of same. It was for the jury to determine whether or not the plaintiff had been properly warned or notified of the approach or

[Central of Georgia Ry. Co. v. Mathis.]

arrival of the train at the particular station in question. While we have only discussed those charges specifically designated and argued in brief of counsel, the others have not been overlooked, and we do not think that the trial court committed reversible error in refusing any of them.

The judgment of the circuit court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

Alabama Great Southern Ry. Co. v. Taylor.

Injury to Servant.

(Decided April 16, 1916. 71 South. 676.)

1. **Master and Servant; Injury to Servant; Jury Question.**—Where the evidence tended to show that the alleged defect had existed for a sufficient time to warrant the inference, either that it was known or would have been discovered by due care, it was a question for the jury whether there was negligence attributable to defendant either in the existence of a defect in the condition of the ways, works, etc., or a failure to remedy the defect, the action being under subdivision 1, § 3910, Code 1907.

2. **Same.**—In such an action whether the method adopted by defendant's roundhouse superintendent in bringing a car down the incline, which resulted in injury to plaintiff, was such a method as due care and reasonable precaution approves, was a question for the jury, under the evidence in this case, the action being under subdivision 2, § 3910, Code 1907.

3. **Same; Superintendents; Acts.**—The evidence examined and held to warrant the conclusion that the railroad employee who directed that a car be brought down an incline in a certain manner was a superintendent within subdivision 2, § 3910, Code 1907.

4. **Appeal and Error; Harmless Error; Repetition.**—Where a witness testified without objection that he had never brought a car down an incline with less than four or five men to let it down, the subsequent allowance of a question by plaintiff to the same witness, eliciting a repetition of that testimony, was harmless to defendant.

5. **Damages; Permanent Injury; Jury Question.**—Where plaintiff had suffered an injury that according to every reasonable probability would continue throughout the remainder of his life, the evidence tending to show that he was less perfect nine months after the injury, that he complained of pain, that two of his ribs had been broken, etc., it was for the jury to determine whether plaintiff had been permanently injured.

6. **Same.**—Where a railroad is liable for the permanent injuries of its servants, the damnifying consequences resulting from such injuries are of the element of recoverable damages.

[Alabama Great Southern Ry. Co. v. Taylor.]

7. Same.—Even an entire absence of data from which to determine the amount of damages to a railroad employee from permanent injuries in service will not deprive him of his right to recover nominal damages.

8. Same; Instruction.—A charge that if the jury were reasonably satisfied from the evidence that plaintiff was permanently injured as alleged, as a proximate consequence of the negligence complained of, they might award him such sum as would reasonably compensate him for such permanent injury, was proper, as advising the jury on the hypothesis that there was evidence warranting compensatory damages, for permanent injury; the plaintiff having been before the jury, and there being evidence tending to show a decrease in his earning capacity indicated in the reduction of wages received by him after his injury, although the mortality tables were not introduced.

APPEAL from Jefferson Circuit Court.

Heard before Hon. C. B. SMITH.

Action by W. T. Taylor against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The ninth count, after setting out the business of defendant and the relationship between plaintiff and defendant, alleges that plaintiff was in the service or employment of defendant as an engine repairer, and while engaged in the discharge of his duties as such employee the plaintiff received the wounds and injuries heretofore alleged; and plaintiff avers that his said wounds and injuries were the proximate consequence of and caused by reason of the negligence of a certain person, namely, Mr. Sims, who was in the service or employment of the defendant, and who had superintendence intrusted to him while in the exercise of such superintendence. Said negligence consisted in this, viz.: The said Mr. Sims negligently caused or permitted a railway car to be propelled down the track and against the tank under which plaintiff was working with such violence as to injure plaintiff as aforesaid. The other facts sufficiently appear.

A. G. & E. D. SMITH, for appellant. ERLE PETTUS, for appellee.

MCCLELLAN, J.—Action by servant against the master for injuries received while engaged in the master's service. The case went to the jury under the issues made by count 1 and amended count 9. There is no insistence upon error in overruling the demurrer to count 1. There is argument for error in overruling the demurrer to amended count 9. The legal sufficiency of the count is affirmed by *A. G. S. Ry. Co. v. Choate*, 184 Ala. 636, 64

[Alabama Great Southern Ry. Co. v. Taylor.]

South. 78; *L. & N. R. R. Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Reiter Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 South. 280.

(1) Count 1 was drawn to state a cause of action under the first subdivision of the Employers' Liability Act (Code, § 3910); and the defect in the condition of the ways, works, etc., to which plaintiff's injury was ascribed, was alleged to be in the "brakes on one of defendant's said cars." The sufficiency of the count is conceded. That there was such a defect in the condition of the car was proven. Whether there was negligence attributable to the defendant either in the defect's existence or in the failure to remedy or repair the defect was made a jury issue by phases of the testimony tending to show that the alleged defect in the condition of the brakes had existed for a sufficient length of time to warrant the inference either that the existence of the defect was known, or, had due care and prosecution been observed, the defect would have been discovered, or would have been remedied.—*L. & N. R. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *A. G. S. R. R. Co. v. Yount*, 165 Ala. 537, 544, 51 South. 737; *Birmingham R. Mill Co. v. Rockhold*, 143 Ala. 115, 42 South. 96. The defendant was not entitled to the general affirmative charge forbidding a recovery under count 1.

Count 9 as amended was drawn to state a cause of action under the second subdivision of the Employers' Liability Act (section 3910), and attributed the plaintiff's injury to the negligence of one Sims, who, it was alleged, was then exercising the authority conferred on him as a superintendent for the defendant.

(2, 3) When injured plaintiff was engaged in repairing the brake rigging under the tank of a locomotive located for the purpose on track No. 1 about defendant's roundhouse. The track at that point was so constructed as to make a pit about four feet deep and of a width the distance between the rails; this to allow workmen to conveniently get at their work underneath locomotives. An inclined track leading from the surface level (at a turntable) to a coal chute elevated approximately ten feet was used to move cars, conveying coal up to the coal chute, where they were unloaded. Between track No. 1, on which the locomotive stood, and the end of the track leading up the incline to the coal chute, was a turntable, which was capable of being so adjusted as to connect track No. 1 with the track to the coal chute by joining therewith a track on the turntable. There was evi-

[Alabama Great Southern Ry. Co. v. Taylor.]

dence tending, at least, to show that by W. D. Sims' direction the tracks were so connected over the turntable as to make a continuous railway from the top of the incline to the point at which the locomotive undergoing repair was located. An empty coal car rested at the coal chute. W. D. Sims directed a single subordinate, John Wheeler, to move the car down the incline. The method contemplated was to "pinch" the car to a point where gravity would apply, and then with the hand brake to restrain the flight of the car down the incline. The brakes on this car were defective; but no inspection at the time to determine their efficiency was made by Sims or by his direction. The car was put in motion by Wheeler; and gained speed as it went down the incline. Wheeler undertook to hold the car with the hand brake, but that was ineffectual. The car, passing down the incline, followed the track across the turntable and collided with the locomotive under which plaintiff was at work, inflicting the injury of which he complains. There was evidence tending to show that proper prudence was not observed by committing the control of the car, on the incline, to only one servant whose reliance to control the car was to be the hand brake; this by testimony suggesting to the judgment of a reasonably prudent man these methods: The letting down of the car with an engine to control its movement; the "chucking" of the car on the incline, thus allowing its gradual descent, four or five men being assigned and used to control the car in its movement down the incline. In view of the circumstances disclosed by the evidence, it is quite clear that the evidence, and reasonable inferences therefrom, required the court to submit to the jury's decision the question whether the method adopted by Sims for bringing this car down the incline was such a method as due care and precaution approved. According to phases of the evidence, the power and authority conferred on Sims with respect to the removal of emptied coal cars from the coal chute down the incline and their disposition thereafter justified the conclusion that Sims was a superintendent within the second subdivision of the Employers' Liability Act (section 3910).—*A. G. S. R. R. Co. v. Ellis*, 137 Ala. 560, 34 South. 829; *Dantzler v. C. & I. Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361.

(4) The witness Lipscomb having theretofore, without objection, testified that he never brought a car down that incline with less than four or five men to let it down, no prejudice to

[Alabama Great Southern Ry. Co. v. Taylor.]

defendant could have resulted from the subsequent allowance of a question (by plaintiff) to the same witness that elicited a repetition of the testimony just stated.

(5-7) Approximately nine months after the plaintiff was injured there was testimony tending to show: That plaintiff was physically less perfect than he was before the injury; that he complained of and suffered pains in his back and sides; that two of his ribs, healed by then, had been broken; that there was a depression over the liver—a depression the jury might have concluded was due to the breaking, or nature-wrought repair, of the ribs. Under the evidence, and reasonable inference deducible from the evidence, it was for the jury to decide whether, as alleged, the plaintiff was permanently injured; had suffered an injury that, according to every reasonable probability, would continue throughout the remainder of his life.—*Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103, 105. If the defendant was found to be liable for plaintiff's injury, and if the jury concluded from the evidence that plaintiff was permanently injured, the damnifying consequences resulting from his permanent injury were of the elements of recoverable damages, and, in the entire absence of data from which to determine the amount of damage resulting from such permanent injury, the plaintiff was entitled to recover nominal damages.—*B. R., L. & P. Co. v. Wright*, 153 Ala. 197, 44 South. 1037; *B. R., L. & P. Co. v. Friedman*, 187 Ala. 562, 571-572, 65 South. 939. The court in the oral charge thus instructed the jury: "If you are reasonably satisfied from the evidence that the plaintiff is permanently injured as alleged in the complaint as a proximate consequence of the negligence complained of, you may award him such sum as would reasonably compensate him for such permanent injury."

(8) This instruction advised the jury upon the hypothesis that there was evidence warranting a finding of compensatory damages for permanent injury. The plaintiff was before the jury as a witness. There was evidence tending to show a decrease in plaintiff's capacity to work, as he did formerly, and of a decrease in his earning capacity, as that was indicated by the reduction of the wages he received for work after he was injured. The mortality tables were not offered in evidence for the jury's consideration on the issue of the pecuniary loss entailed by his permanent injury (if so)—the probable duration of the existence of the result of his permanent injury.—*B. R., L. & P. Co. v.*

[Birmingham Railway, Light & Power Co. v. Gray.]

Wright, supra. The failure to offer the mortality tables in evidence does not authorize the conclusion that there was no evidence before the jury from which the jury could form a judgment as to the probable duration of the permanent injury suffered by the plaintiff, if such injury was sustained by him. As is indicated by the reference heretofore made to the presence of the plaintiff before the jury and to the tendencies of the evidence touching the damnifying effect of his injury upon his capacity to work and to earn wages, it cannot be held that there was an entire absence of evidence bearing upon the damnifying effect of his injury, if his injury was found by the jury to be permanent.—*Mary Lee Coal Co. v. Chambliss*, 97 Ala. 171, 175, 11 South. 897.

This disposes of all the assignments of error insisted upon in brief for appellant.

No prejudicial error appearing, the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Birmingham Railway, Light & Power Co. v. Gray.

Injury to Passenger.

(Decided April 20, 1916. 71 South. 689.)

1. **Carriers; Passengers; Complaint.**—Counts charging simple negligence, and alleging that defendant was a common carrier of passengers, that plaintiff was a passenger, and that defendant so negligently conducted itself in and about her carriage thereon, that at a certain time and place plaintiff was thrown or caused to fall from the car, was sufficient.

2. **Evidence; Statement of Injured; Expressions.**—Expressions of pain, together with the locality, nature, extent and character of it, are usually admissible in an action for damages for personal injuries; but the rule does not include declarations as to the cause of pain or narrations of past conditions. Such declarations can be proven by anyone who heard them.

3. **Same.**—While it might be error to permit a person to testify as to what he said or did indicative of pain, it is proper for him to testify whether or not he suffered pain.

4. **Carriers; Passengers; Injuries; Instruction.**—Where the action was by a passenger for personal injuries, an instruction, hypothesizing the allegations of complainant, and asserting that if plaintiff was injured as alleg-

[Birmingham Railway, Light & Power Co. v. Gray.]

ed as a proximate consequence of defendant's negligence as alleged, and if defendant negligently closed its gates on plaintiff as alleged, while plaintiff was alighting from its car, plaintiff could recover, was proper.

5. Same; Care Required.—The law requires the highest degree of care, diligence and skill of those engaged as common carriers of passengers known to careful, diligent and skillful persons engaged in such business, consistent with the practical operation of the business.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Mrs. Ethel Gray against the Birmingham Railway, Light & Power Company, for damages for injuries suffered while a passenger. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from Court of Appeals under Acts 1911, p. 449.

TILLMAN, BRADLEY & MORROW, for appellant. PROSCH & PROSCH, for appellee.

MAYFIELD, J.—Action, by passenger against common carrier, to recover damages on account of personal injuries. The negligence alleged, which went to the jury, was the closing of the gate of the street-car upon plaintiff while she was in the act of alighting from the car at the end of her journey; and the sudden jerking or lurching of the car, at that moment, which caused plaintiff to fall and injure herself. There were no pleas of contributory negligence, and the wanton counts were charged out by the court. The jury found for the plaintiff and assessed her damages at \$375.

Each of the counts was sufficient in an action by a passenger against a carrier for negligence in causing personal injuries, and they were therefore not subject to the demurrers thereto interposed.

(1) Counts charging simple negligence of a common carrier to the injury of a passenger on one of its cars, which allege that the defendant was a common carrier of passengers, that plaintiff was a passenger, and that it so negligently conducted itself in and about her carriage thereon that at a certain time and place plaintiff was thrown or caused to fall from said car, are sufficient.—*Birmingham Co. v. Fisher*, 173 Ala. 623, 55 South. 995, 7 Mayf. Dig., 101.

(2) There was no error in allowing witnesses to testify that plaintiff complained of her injuries. These expressions of pain,

[Birmingham Railway, Light & Power Co. v. Gray.]

and of the locality, nature, extent, and character of it, are usually admissible evidence. True, the rule allows an opportunity for simulation and the perpetration of fraud; but necessity and justice require it. The reality or simulation of pain as the cause of such expressions is a question for the jury. The rule, however, has limitations. The declarations must be limited to the existence of pain and suffering at the time they are made, and do not extend to rehearsals or narrations of past conditions or sufferings; nor does the rule extend to declarations as to the cause of the pain or suffering.—*Western Steel Co. v. Bean*, 163 Ala. 260, 50 South. 1012; Mayf. Dig., 314. The declarations, if admissible, can be proven by any one who heard them.—*Id.*

(3) It might be error to allow the plaintiff to testify as to what he said or did, on these occasions, indicative of pain. It would be better and more appropriate for him to testify whether or not he suffered pain, than to what he said about it.—*Id.*, 163 Ala. 260, 50 South. 1012.

In an action against a common carrier for injury to a passenger, complaints of pain and suffering, and symptoms indicative of injury, made by the person injured, are admissible.

(4, 5) There was no error in the giving of any of the plaintiff's written requested charges. They were as follows: "(1) If the jury is reasonably satisfied from all the evidence in this case that the plaintiff was injured in the manner and form alleged in the complaint, as the proximate consequence of the defendant's negligence as alleged thereon, then you must find a verdict for the plaintiff.

"(2) If the jury is reasonably satisfied from all the evidence in this case the defendant, its agents or servants, negligently closed the gates on the plaintiff as alleged in the said complaint, while plaintiff was in the act of alighting from said car, and that she received her said injuries proximately from said gates being closed upon her, you must find a verdict for the plaintiff.

"(3) The court charges you, gentlemen of the jury, that the law requires the highest degree of care and diligence and skill, by those engaged as a common carrier of passengers by street cars known to careful, diligent, and skillful persons, engaged in such business, consistent with the practical operation of the road."

Charges 1 and 2 practically hypothesized the material averments of the complaint, and as there were no special pleas of con-

[United States C. I. P. & F. Co. v. McCoy.]

tributory negligence, etc., there was no error in the giving of the charges.

The evidence was sufficient to support a verdict under either of the counts allowed to go to the jury; hence there was no error in refusing defendant's requested charges which were in effect the general affirmative charge to find for the defendant as to these counts.

We find nothing in this record which would justify us in holding that the trial court erred in refusing the motion for a new trial. As we have said above, there was evidence sufficient to support the verdict; and we are not prepared to say that the verdict was excessive.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

United States C. I. P. & F. Co. v. McCoy.

Injury to Servant.

(Decided February 3, 1916. Rehearing denied March 23, 1916.
71 South. 406.)

1. Master and Servant; Injury to Servant; Complaint.—The count alleging that the plaintiff was employed as a machine shop helper, and was injured as a proximate consequence of the negligence of the superintendent of defendant in permitting plaintiff to be sent to work with men incapable of assisting plaintiff in the work which he was required to do; or in sending men to assist plaintiff who were inexperienced and incompetent; or in sending an insufficient number of men to assist plaintiff, stated a cause of action.

2. Same.—A count alleging that plaintiff's injury was proximately caused by another employee, entrusted with superintendence, in ordering plaintiff to assist him in lowering or tightening down a steady rest under the arm of a crane, in doing which he was compelled to stand under the chains and block which were being raised by the crane runner, and that it was the duty of the superintendent to notify him that the blocks were being jammed by the runner, but that he failed to give such notice or to stop the runner before the chains and block fell upon plaintiff, stated a cause of action; and the fact that complaint alleged that the superintendent ordered plaintiff to do what he was doing at the time of the injury, did not necessarily bring the count exclusively within subdivision 3, making the master liable when the servant is injured in obeying a negligent order of a superior.

3. Same.—Subdivisions 2 and 3 of § 3910, Code 1907, cover in common the cases in which a superintendent gives a negligent order, and in such cases the complaint may be framed under either subdivision.

[United States C. I. P. & F. Co. v. McCoy.]

4. Same; Negligence of Superintendence; Evidence.—The evidence examined and held not to sustain a verdict against defendant on the second count of the complaint.

5. Same; Fellow Servant.—A master is not liable for injury to a servant occasioned by the negligence of a fellow servant in the absence of any negligence in furnishing incompetent and inexperienced fellow servants.

6. Same; Incompetent Servant.—In an action by a servant for injury, a single act of negligence on the part of an experienced fellow servant operating a crane on the occasion of plaintiff's injury, was not sufficient to warrant a finding that such fellow servant was unskilled or incompetent.

7. Same; Evidence.—Where it appeared that anyone with very little training could operate the crane whose runner jammed the chain and blocks until they fell and injured plaintiff, that plaintiff, one of the common laborers, had himself operated the crane, evidence that plaintiff had complained generally to his foreman about the manner in which the crane was operated, and of complaints of its operation by persons other than the operator was inadmissible, in the absence of evidence that the operator of the crane was incompetent, as the issue was limited to the competency of the operator at the time.

8. Same; Negligent Order of Superintendent; Evidence.—The evidence examined and held to require a submission to the jury as to whether the alleged order of the superintendent was negligent.

9. Same; Assumption of Risk.—Under the evidence in this case it cannot be held as a matter of law that plaintiff assumed the risk of injury from the negligence of his superintendent.

APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

Action by Ben McCoy against the United States Cast Iron Pipe & Foundry Company, for damages for injuries while in its employment. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

In the second count of the complaint, after alleging that defendant was operating a pipe shop, and that plaintiff was employed therein as a machine shop helper, and while in such service or employment, and engaged in the discharge of his duties as such employee, plaintiff received the wounds and injuries described, it is alleged that the said wounds and injuries were the proximate consequence of, and caused by the reason of, the negligence of one Ike Jones, who was in the service or employment of defendant, and who had superintendence intrusted to him, while in the exercise of such superintendence, and that said negligence consisted in this: That said person negligently permitted the plaintiff to be sent to work with men incapable of safely assisting the plaintiff in the work which he was required to do, or said person negligently sent those to assist plaintiff in his

[United States C. I. P. & F. Co. v. McCoy.]

work who were inexperienced, and who were not sufficiently skilled workmen to safely aid the plaintiff in the work which he was required to do, or said person negligently furnished incompetent men to assist the plaintiff in the work that he was required to do, or said person negligently failed to furnish a sufficient number of men to assist plaintiff in the work which was required. The third count, after stating the same facts as to employment, etc., alleges that the injuries and wounds were proximately caused by reason of one C. J. Jarrett, who was in the service or employment of defendant, and who had superintendence intrusted to him, whilst in the exercise of such superintendence, and that said negligence consisted in this: That the said C. J. Jarrett was engaged in putting a pipe into a lathe, that while so engaged it became necessary to use a crane; that the said C. J. Jarrett had instructed the crane runner to hoist the chains which had been attached to the pipe; that the said C. J. Jarrett then ordered the plaintiff to assist him in lowering or tightening down a steady rest; that it was the duty of the plaintiff to obey the orders of the said C. J. Jarrett, and while so conforming to the said order, he was compelled to stand under the chains and blocks which were being raised by the crane runner; that the plaintiff's back was turned toward the crane runner, and it was the duty of the said C. J. Jarrett to notify the plaintiff of the fact that the chain blocks were being jammed by the crane runner, which he failed to do, or it was the duty of the said C. J. Jarrett to stop the crane runner before the blocks were jammed, or to have the crane moved so that the blocks and chain would not be over or above plaintiff, which he negligently failed to do, and the plaintiff, being unaware of his peril, continued to labor until the chain and blocks fell upon him and injured him, as aforesaid. Demurrers were interposed and overruled to these counts. The following is charge 7, refused to defendant:

"The court charges the jury that if you believe and find from the evidence that the risk of the injuries received by plaintiff was as open and obvious to him, or as well understood by him, as it was by the defendant, then I charge you that he assumed the risk of the injuries he received, and he is not entitled to recover.

ESTES, JONES & WELCH, for appellant. ETHERIDGE & LAMAR, and BEN G. PERRY, for appellee.

[United States C. I. P. & F. Co. v. McCoy.]

SAYRE, J.—(1) The trial court's ruling on the second count of the complaint may be sustained on the authority of *A. G. S. Ry. Co. v. Choate*, 184 Ala. 636, 64 South. 78.

(2, 3) The third count stated a cause of action under the second subdivision of the Employer's Liability Act (section 3910 of the Code), which makes the master or employer liable to his servant or employee for injury caused by the negligence of a superintendent. The allegation that defendant's superintendent, whose orders it was plaintiff's duty to obey, and did obey, ordered plaintiff to do what he was doing at the time of his injury did not necessarily bring the count under the exclusive influence of that subdivision of the section (subdivision 3) by which the employer is made liable when the employee is injured by reason of conforming to the negligent order of a superior to whose order he is bound to conform. These subdivisions cover a certain field in common, viz., cases in which a superintendent gives a negligent order. In such cases the complaint may be framed under either subdivision. However, the count in question was framed under the superintendence subdivision, since its gravamen is to be found in the allegation that defendant's superintendent failed to notify plaintiff that the chain blocks were being jammed by the crane runner, as it was his duty to do, or negligently failed to stop the crane runner before the blocks were jammed, or to have the crane moved, so that the block and chain would not be over or above plaintiff. The demurrer points out the fact that the count does not aver in terms that defendant's superintendent negligently failed to notify plaintiff that the chain blocks were being jammed; but we think the demurrer was correctly overruled, since the count avers that it was his duty to give such notice, intending, on fair construction, that such was his duty in the presence of the particular emergency alleged. An averment of that duty and of the superintendent's failure to perform it is the equivalent of an averment that the failure was negligent.

(4-6) There was no evidence to sustain a verdict against defendant on the second count of the complaint. Clearly and without contradiction or adverse inference, the negligence of one Curl was the immediate cause of plaintiff's injuries. Plaintiff was at his proper place, helping the machinist Jarrett adjust and fasten an iron pipe in a lathe operated by the latter. An electric crane had been used to lower the pipe into its place in the lathe.

[United States C. I. P. & F. Co. v. McCoy.]

and the block, chains, and hooks, by means of which the crane moved the pipe, had been detached, it remaining only for the crane runner, Curl, to raise them out of the way. Curl sat upon a platform next to the mast of the crane, and all he had to do was to move a lever this way or that, in order to raise or lower the blocks, chains, and hooks. After the pipe had been placed in position and the hooks detached, Jarrett was attempting to throw over a "steady rest," which would hold the pipe safely in its place on the lathe, while plaintiff stood on the other side of the lathe to receive and fasten it down. But the "steady rest" was rather heavy for Jarrett, and a number of employees, who witnessed the operation, were standing about laughing and jeering at his efforts to throw it over. Curl had set his machine in motion to raise the block, etc., but instead of watching its movement to stop it at the proper place, he gave his attention to Jarrett, and joined in the general merriment at his expense. It resulted that when the block reached the housing of the crane's arm, the continued motion of the motor or engine broke the cable on which the block was suspended, thus causing the block and its attachments to fall upon plaintiff. Curl was plaintiff's co-employee, and for his negligence defendant was not answerable to plaintiff in the absence of the co-operating principle invoked by the second count of the complaint.

Now the second count sought a recovery on the allegation, in substance, that one Jones, defendant's superintendent, negligently permitted plaintiff to be sent to work with men incapable of safely assisting him in his work, or negligently sent inexperienced and unskilled, or incompetent, workmen, or an insufficient number of workmen, to assist plaintiff in the work he was required to do. We have read the record, without finding evidence that Curl lacked that measure of experience, skill, or competence required to operate the crane, or, however that may have been, that Jones was negligent in employing or retaining him in the service. Curl had had experience, and his single act of negligence on the occasion of plaintiff's injury was not sufficient to warrant a finding that he was unskilled or incompetent.—*Conrad v. Gray*, 109 Ala. 130, 19 South. 398; *First National Bank v. Chandler*, 144 Ala. 286, 29 South. 822, 113 Am. St. Rep. 39. Defendant was due the general charge on the second count as requested.

[United States C. I. P. & F. Co. v. McCoy.]

(7) It was in undisputed proof that any one with very little training could operate the crane, and that, after the discharge of an Italian boy, whose steady job it had been, various persons about the shop had operated it as occasion required. Plaintiff, who belonged to the "floating gang"—that is, the body of common laborers employed to help about the shop whenever and wherever they were directed, among the rest—had operated the crane. In this state of the proof, and in the absence of evidence going to show that Curl was incompetent, plaintiff's testimony to the effect that he had complained generally to Hatten, foreman of the machinists' helpers—i. e., the "floating gang"—about the manner in which the crane was operated should have been excluded. A fortiori, complaints of the operation of the crane by named persons other than Curl were irrelevant. Such complaints did not competently tend to prove negligence or incompetence on the part of any one; but, had incompetence been shown by evidence sufficient to carry that question to the jury, it may be, by evidence of repeated acts of negligence or otherwise, complaints would have been competent only to trace knowledge to the employer. In this case the competence vel non of Curl alone was within the issue defined by the count and the undisputed evidence was that he was operating the crane at the time of plaintiff's hurt.

(8) Whether the defendant was entitled to the general charge as to count 3 of the complaint is not so clear. It has already appeared that this count attributed plaintiff's injury to the negligence of Jarrett, the machinist in charge of the lathe, and exercising superintendence over helpers, for that he failed to notify plaintiff that the chain block was being jammed by the crane runner, or to have the crane moved so that the block and chain would not be over or above plaintiff. This last alternative of the count meant, in the light of the evidence, that Jarrett should have directed that the crane be swung to one side before the block and chain was raised, this in anticipation that the negligence of Curl, the crane runner, might force them from their attachment to the arm of the crane. But this hypothesis of negligence was wholly unreasonable. In reason the count and the evidence offered in support of it were resolved into this proposition: That it was the duty of Jarrett to direct the operation of the crane after it had served its purpose by placing the pipe on the lathe, or, more specifically, that he should have watched the operation of the

[United States C. I. P. & F. Co. v. McCoy.]

crane thereafter and given Curl, the crane runner, a signal when to stop. The evidence for defendant went to show that the arm of the crane and the block suspended therefrom were, at all times, in full view and under complete control of the crane runner; that Jarrett, being concerned only to see that the pipe was properly laid upon the lathe, gave the order to the operator of the crane to hoist up the disengaged block and chains and get them out of the way, after which no rule promulgated by the master nor any rule of reasonable care in conducting the operations of the shop required that his attention should further follow the crane, or that he should do what was more conveniently and safely intrusted to the crane runner. Had this theory of the respective duties of Jarrett and Curl found acceptance with the jury, defendant should not have been found liable under the third count of the complaint. But plaintiff adduced some testimony which perhaps the jury may have construed to mean that it was the practice of the shop for the machinist in charge of the lathe to follow all the movements of the crane and give orders for its every operation, and upon this construction of the evidence the third count was properly submitted to the jury, for, from such practice duty may have been inferred; and if there was the duty on the part of Jarrett to notify or direct the crane runner when to stop the raising of the block and chain after they had been detached from the pipe, then his neglect of that duty would result in defendant's responsibility for its consequences.

(9) If Jarrett's superintendence of plaintiff and the crane runner extended as far as plaintiff seems to have contended it did, then it cannot be said that plaintiff assumed the risk of injury by the negligence of Jarrett, whose duty it was, on this hypothesis, to care for the safety of plaintiff, his subordinate co-employee.—*L. & N. R. R. Co. v. Handley*, 174 Ala. 593, 603, 56 South. 539, and cases there cited. We cannot say, therefore, that there was error in the refusal of charge 7, requested by defendant. We have said enough to indicate our view of all questions raised by the assignments of error.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

[Garrett v. L. & N. R. R. Co.]

Garrett v. L. & N. R. R. Co.**Injury to Minor Employee.**

(Decided April 20, 1916. 71 South. 685.)

1. **Negligence; Proximate Cause.**—Where there are two or more causes of an injury, the law will consider only the proximate cause, and not a remote cause.

2. **Same; Intervening Cause.**—Where one cause merely created the condition, and after the condition had been created an intervening agency produced the injury, the first cause is not the proximate cause.

3. **Master and Servant; Injury to Servant; Proximate Cause.**—Where defendant wrongfully employed plaintiff's minor son, without her knowledge or consent, to work on a barge on the river, and the work was not essentially dangerous, and the boy appeared to be an adult, and one of the other employees on the barge pushed the boy into the river, as a joke, and the boy was drowned, the defendant's wrong in employing the boy was not the proximate cause of the death, and defendant was not liable.

4. **Common Law; Applicability; Statutory Remedy.**—While the action for the death of plaintiff's minor son was brought under the homicide act (§ 2485, Code 1907), yet it is founded on defendant's common law wrong in employing a minor at a hazardous work, without the consent of the parent, the common law principle governs, and the scope and policy of the prohibitive statute are without application.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Action by Mattie Garrett against the Louisville & Nashville Railroad Company, for damages for death of a minor child by drowning. Judgment for plaintiff, and defendant appeals. Affirmed.

The action is based upon the wrongful death of plaintiff's minor son, for that defendant wrongfully employed him, without plaintiff's consent, at a dangerous work, and that death resulted therefrom. The evidence shows without dispute that defendant employed deceased without plaintiff's knowledge or consent, the father of deceased being dead, and put him to work on a barge in the Alabama river, by weaving boughs together and dropping them and staves over the edge of the barge around the base of the piers of the railroad bridge. The current was swift at that point, and the water about 30 feet deep. While the deceased was thus engaged, another employee of defendant, a man named

[Garrett v. L. & N. R. R. Co.]

Irving, winked at the other men, and then pushed deceased over the edge of the barge into the deep water, where, in spite of all efforts to rescue him, he was speedily drowned. Deceased was 19 years of age, and appeared to be a grown man, and had worked for defendant several months. The barge was 15x20 feet, and on it at this time were 8 or 10 white men and about 15 negroes. At the conclusion of the evidence, the court, at the request of defendant, gave the general charge for defendant, and this ruling is assigned for error.

HILL, HILL, WHITING & STERN, and R. T. RIVES, for appellant. GOODWYN & MCINTYRE, for appellee.

SOMERVILLE, J.—(1, 2) Although judicial decisions are not always harmonious in their application of the principles which determine whether any wrongful act is the proximate and judicial cause of a particular injury, the principles themselves are settled beyond further controversy and a simple statement thereof from the leading authorities will suffice for the purposes of the present case.

“The law, in its practical administration in cases of this kind, regards only proximate or immediate, and not remote, causes, and, in ascertaining which is proximate and which remote, refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause.”—*Atchison, etc., Ry. Co. v. Calhoun*, 213 U. S. 1, 29 Sup. Ct. 321, 53 L. Ed. 671; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

“Where two distinct, successive causes, unrelated in operation, to some extent contribute to an injury, it is settled that where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition, or give rise to the occasion, by which the injury was made possible. It seems to be sound in principle and well settled by authority that where it is admitted or found that two distinct, successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate, and the other the remote, cause of the injury, and the court, in passing on the facts

[Garrett v. L. & N. R. R. Co.]

as found or admitted to exist, must regard the proximate as the efficient and consequent cause, and disregard the remote cause.”—*Mo. Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399.

“Suppose that if it had not been for the intervention of a responsible third party the defendant’s negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable. * * * For the spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us. In other words, so far as concerns my fellow beings, their acts cannot be said to have been caused by me, unless they are imbeciles or act under compulsion, or under circumstances produced by me, which gave them no opportunity for volition.”—Wharton on Neg. 138.

After a full discussion of this subject, Mr. Freeman, in noting some differences in the cases where the subsequent act of the third person is merely negligent, concludes:

“But the courts, at least in this country, refuse to hold a tort-feasor liable for the results of a subsequent act which is willfully wrong, unless that act was actually intended by him.”—*Gilson v. Delaware, etc., Canal Co.*, 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, note, 807, 842, 843, citing the authorities.

Our own decisions, so far as they have spoken, are in harmony with these principles, and in the case of *Tobler v. Pioneer, etc., Co.*, 166 Ala. 482, 509, 52 South. 86, 96, it was said: “A wrongful act of independent third persons (it conclusively appears that this was such, though they may have been the servants of the master), not actually intended or reasonably to be expected by the master, is not the consequence of the master’s wrong, and he is not bound to anticipate the general probability of such acts.”

[Garrett v. L. & N. R. R. Co.]

In that case the intervening act was negligent merely, and not a willing wrong. See, also, *W. Ry. of Ala. v. Milligan*, 135 Ala. 205, 33 South. 438, 93 Am. St. Rep. 31, and *Kirby v. L. & N. R. R. Co.*, 187 Ala. 443, 65 South. 358.

(3) We hold on the evidence, as shown without dispute by the bill of exceptions, that the work in which the deceased was engaged was not dangerous in itself, nor with respect to either its incidents or its environments, to this deceased, who was 19 years of age, and mature in body and mind, and, further, that, even if the work or place were dangerous, nevertheless the act of the man Irving in pushing plaintiff's son over the edge of the barge into the river was willful, independent, not connected with, nor in any way related to, the defendant's business, and neither intended nor anticipated by the defendant, and hence was in a legal sense the sole proximate and responsible cause of the injury, of which the deceased's employment by defendant and his presence on the barge furnished merely the chance condition and opportunity. A contrary conclusion could not be supported, either by reason or judicial precedent. Two striking and pertinent illustrations of proximate and remote causes of injury will be found in the cases of *King v. Henkie*, 80 Ala. 505, 510, 60 Am. Rep. 119, and *A. G. S. R. R. Co. v. Chapman*, 80 Ala. 615, 620, 2 South. 738, to which we merely refer.

We do not overlook those cases decided under statutes which forbid the employment of children in certain places and pursuits which common experience has shown are peculiarly dangerous to them. Such prohibitions, extending usually to children under 14 years of age, are, no doubt, intended to protect immature children, not only against the perils of their own immediate tasks, but also against their propensity to playful diversions, and the general perils of their environment. In some such cases the doctrines of proximate cause seem to have been applied somewhat liberally in favor of the master's liability for the original wrongful employment of the child.—*Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, note, 8 Ann. Cas. 638; *Elk Cotton Mills v. Grant*, 140 Ala. 727, 79 S. E. 836, 48 L. R. A. (N. S.) 656, note; *Perry v. Tozer*, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416. But, even in such cases, the injury must result naturally from the work itself, or from the operation of the business by others, or from contact with some dangerous condition or agency belonging to or permitted about the place.

[McKinnon v. City of Birmingham, et al.]

So this court has recently said: "Nor is it necessary that injury must result as the proximate cause of some act or omission of the minor in the discharge of the duty assigned him, but the right of action arises if the injury resulted from the employment and was incident to any of the risks or dangers in and about the business. Of course, there would be no causal connection if the boy got sick or was injured in some way foreign to the master's work or business, although in or near the mine; but if the injuries are produced while the boy is at the forbidden place—that is, in or about a mine by some cause not foreign to the master's mine or business—there is such a causal connection with the forbidden employment as would render the master liable."—*De Soto, etc., Co. v. Hill*, 179 Ala. 186, 60 South. 583.

(4) While the present action is brought under the Homicide Act (Code, § 2485), it is founded on a common-law wrong, the employment of a minor at a dangerous work without the consent of the parent; and the scope and policy of the prohibitive statutes above referred to are without application here.

The trial court properly gave the general affirmative charge for the defendant, and the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

McKinnon v. City of Birmingham, et al.

Injury from Defective Street.

(Decided February 3, 1916. Rehearing denied March 30, 1916.
71 South. 463.)

1. **Municipal Corporations; Defective Streets; Filing Claim; Time.**—Under § 1275, Code 1907, when construed to effect its purpose to give the officers of a city opportunity to investigate the claim, and not to require technical accuracy which might result in the defeat of meritorious claims, a statement giving the day of the month and year, but not whether in the day time or night time, was a sufficient statement of the time.

2. **Time; Day.**—As defined by statute, and within the meaning of the law a day means twenty-four hours—the period of time intervening between any midnight and the midnight following.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROW.

[McKinnon v. City of Birmingham, et al.]

Action by R. A. McKinnon against the city of Birmingham and others, for damages alleged to have been sustained by a fall caused by a defective street. Judgment for defendant and plaintiff appeals. Reversed and remanded.

F. E. BLACKBURN, for appellant. M. M. ULLMAN, and W. A. JENKINS, for appellee.

GARDNER, J.—Appellant brought suit against appellee for recovery of damages alleged to have been sustained by a fall on the sidewalk of the city of Birmingham, caused by stumbling over a stake across which a wire was stretched. The complaint, as last amended, shows that on August 7, 1914, plaintiff made out in writing his claim against the said city for the damages therein set forth and his claim was duly verified. It was set forth that the injury occurred on May 20, 1914, and the said claim was duly presented and filed with the clerk of said city. The demurrer to the complaint, as last amended, which was sustained by the court below, takes the point that the complaint shows the claim filed by the plaintiff did not sufficiently allege the time when said accident occurred, and this is the only question presented for determination on this appeal.

(1) Section 1275 of the Code provides for the filing of claims against a municipality in the following language: "No recovery shall be had against any city or town on a claim for personal injury received unless a sworn statement be filed with the clerk, by the party injured, or his personal representative in the case of his death, stating substantially the manner in which the injury was received and the day and time, and the place where the accident occurred, and the damages claimed."

Counsel for appellee insist that the claim is insufficient in merely giving the date and the year, without stating whether it was during the day or night that the accident occurred. In *East Tenn., etc., R. R. Co. v. Carloss*, 77 Ala. 443, this court, in speaking of the statute then in existence, which provided that in a suit against a railroad company for damages to live stock, or cattle of any kind, the complaint must state, among other things, the time when the killing or injury occurred said: "The purpose of the requirement is to inform the railroad officials, with reasonable certainty, as to the circumstances attending the alleged injury, so that they may act advisedly in the investigation of

[McKinnon v. City of Birmingham, et al.]

the case, either with the view of voluntarily adjustment, or of defense at law. The time, we think, should be stated to be a specified day of a given month and year."

It will thus be seen that this court held the view that it was a sufficient designation of the time to give the day of the month and year. In speaking of the statute under consideration in the instant case it was said in *Brannon v. City of Birmingham*, 177 Ala. 419, 59 South. 63: "Statutes similar to this one have been previously construed by this court, wherein it was held that they were designed for the purpose of giving the city authorities an opportunity to investigate and adjust claims made against the city, without the expense of litigation, and that a compliance therewith on the part of the plaintiff was a condition precedent to the maintenance of a suit.—*Newman v. B'ham*, 109 Ala. 630, 19 South. 902; *Bland v. Mobile*, 142 Ala. 142, 37 South. 843."

And in *Newman v. Mayor and Alderman of Birmingham*, 109 Ala. 630, 19 South. 902, cited in the *Brannon Case*, this language was used: "Technical accuracy is not required. It is enough if the board is fairly informed of the nature and amount of the claim, so that it can act intelligently in the investigation and allowance or rejection of the same."

It thus appears that the holding of this court, in construing statutes of this character, to the effect that technical accuracy is not required, but that substantial compliance with the statute is sufficient, is in line with the weight of authority and in conformity with good reason.—5 *McQuillan on Mun. Corp.* 5124, 5125; *Hase v. City of Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938; *Sullivan v. City of Syracuse*, 77 Hun, 440, 29 N. Y. Supp. 105.

We are also in accord with the following statement found quoted in *Hase v. Seattle, supra*, that: "It was not intended that the terms of the notice should be used as a stumbling-block or pit-fall to prevent recovery by meritorious claimants."

(2) As defined by statute and within the meaning of the law a day means 24 hours, the period of time between any midnight and the midnight following.—13 Cyc. 262. When the purpose of the statute as above set forth is considered, we are persuaded that a claim, stating a specified day of a given month and year, is a substantial compliance with the statute, and it was not the intention of the lawmakers to require a more specific description, either as to the hour or whether it was night or day.

[Tennessee C. I. & R. R. Co. v. Rutledge.]

The trial court was doubtless guided in the conclusion reached by the language used in the opinion in *Brannon v. Birmingham, supra*. The statement in the opinion, to the effect that the claim should state whether the accident occurred during the day or night, if the exact hour is not given, was a mere dictum, as a reading of the opinion readily discloses. The question determinative of the appeal, as shown by the opinion, was that of a material variance between the statement of the claim as to the place of the injury and the proof with respect thereto, and a reference to the brief of counsel for appellee in that cause discloses that to have been the point pressed upon the consideration of the court.

We are of the opinion that the complaint, as last amended, was not subject to the demurrer interposed thereto, and the judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded. All the Justices concur.

Tennessee C. I. & R. R. Co. v. Rutledge.

Assault and Battery.

(Decided May 11, 1916. 71 South. 990.)

1. **Master and Servant; Tort of Servant; Liability.**—The legal liability of an employer for the wrongful acts of its employees depends upon whether such employee was acting in the line and scope of his authority at the time the wrong was committed.

2. **Same; Evidence.**—Where the action was for assault and battery committed by an employee of defendant, declarations of the employee made immediately preceding the alleged assault and going to show that the servant had orders to remove plaintiff from the premises, in connection with other facts and circumstances in evidence, were admissible as tending to disclose the authority committed to the employee.

3. **Same; Fellow Servant; Doctrine Applied.**—The common law doctrine of assumption of risk of injury by one servant consequent upon the negligence of a fellow servant is without application to the case of an assault by a mine foreman upon a mine employee, the foreman having particular authority to eject him from the mine; the effect of the doctrine is limited to risks incident to the common employment.

APPEAL from Birmingham City Court.
Heard before Hon. JOHN C. PUGH.

[Tennessee C. I. & R. R. Co. v. Rutledge.]

Action by Jesse Rutledge against the Tennessee Coal, Iron & Railroad Company, for damages for an assault and battery. Judgment for defendant, which, upon motion, was set aside, and new trial ordered, from which judgment defendant appeals. Affirmed.

PERCY, BENNERS & BURR, for appellant. BEDDOW & OBERDORFER, for appellee.

MCCLELLAN, J.—The appellee instituted this action against the appellant to recover damages for assault and battery alleged to have been committed upon the plaintiff by the defendant's "agent or servant, acting within the line and scope of his authority as such." Upon the conclusion of the evidence the court gave the general affirmative charge for the defendant. The plaintiff's motion for a new trial was granted, and from this ruling the appeal is prosecuted.

(1, 2) The legal accountability of the defendant for the wrongful acts of one in its employ or service depends, of course, upon whether the servant committing the wrong was, at the time, acting within the line and scope of his authority.—*Case v. Hulsebush*, 122 Ala. 212, 217, 26 South. 155; *Hardeman v. Williams*, 150 Ala. 415, 43 South. 726, 10 L. R. A. (N. S.) 653; *Id.*, 169 Ala. 50, 53 South. 794. Higgins, who committed the alleged assault, was in the employ of the defendant as a foreman. The witness Johnson testified to declarations by Higgins, made immediately preceding the alleged assault, which went to show that Higgins had authority, "orders," to remove the plaintiff from the premises. There does not appear to have been any questioning of the admissibility of the declarations attributed by the witness to Higgins. Doubtless, that testimony was admissible, in connection with other facts and circumstances shown by the evidence, as tending to disclose the authority committed to the foreman (Higgins) in the premises.—*Pullman Co. v. Meyer*, 195 Ala. 397, 70 South. 763-765, and decisions therein cited.

(3) It is urged for appellant that, since the action does not seek to avail of the provisions of our Employers' Liability Act (Code, § 3910), the plaintiff should be and is concluded by the application of the common law doctrine of assumption by one servant of risks, incident to the common employment, of injury consequent upon the negligence of a fellow servant.—*Laughran*

[Southern Railway Co. v. Fricks.]

v. Brewer, 113 Ala. 509, 517, 21 South. 415. The doctrine's effect is at least limited to risks incident to the common employment. Assuming that plaintiff bore, at the time the alleged assault was committed upon him, the relation of servant to the common master (*L. & N. R. R. Co. v. Chamblee*, 171 Ala. 188, 54 South. 681, Ann Cas. 1913A, 977), it is manifest that if the testimony of the witness Johnson should be accepted as true by the jury, the foreman (Higgins) was not a fellow servant of the plaintiff, but was exercising, though abusing it may be, the particular authority conferred on him by the master to eject this plaintiff from the mine, an authority that, if conferred upon Higgins, and exercised, though abused by him, necessarily negated an essential element of the common-law doctrine stated, viz., service by Higgins and plaintiff in the common employment of the defendant, in consequence of which service injury was inflicted upon plaintiff by Higgins. Indeed, the mentioned testimony of Johnson effected, if accepted, to disclose the authorization of Higgins to exclude plaintiff from defendant's service.

The court erred in giving the general affirmative charge for defendant, and hence did not err in granting the plaintiff's motion for a new trial.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Southern Railway Co. v. Fricks.

Injury to Person on Track.

(Decided April 20, 1916. 71 South. 701.)

1. **Railroads; Persons on Track; Complaint.**—Where the complaint alleged that the place where deceased was run down and killed was one where people traveling along the track were wont to pass in great numbers, which fact was known by the agents and servants of defendant, who knew that plaintiff's intestate was going to be in said place, and that the servants of defendant willfully, wantonly and intentionally backed the car on a side track at a high and dangerous speed, without giving any warning, running the same over and killing plaintiff's intestate, charged wantonness, and was not misleading in such sense as to induce defendant to believe that simple negligence was charged.

2. **Negligence; Wantonness; Instructions.**—Contributory negligence is no defense to a count charging wantonness, and charges on that issue should be refused.

[Southern Railway Co. v. Fricks.]

3. **Witnesses; Impeachment.**—An engineer in charge of a train which killed intestate could not be impeached by proof that shortly after the accident the engineer stated that deceased ought to have been killed, as he should not have been on the track, since such statement was not part of the *res gestae*, and not admissible as against the railroad company in an action for killing deceased, and hence, such evidence was not properly received, although the engineer denied making the statement.

4. **Evidence; Declaration of Agent; Res Gestae.**—An agent cannot bind his principal by admissions or declarations relating to bygone transactions; hence, statements made by those in charge of a train which ran down plaintiff's intestate, made some time after the accident, are not part of the *res gestae* and are not admissible.

APPEAL from Jackson Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by Mrs. Mary Fricks as administratrix against the Southern Railway Company, for damages for the death of her intestate. Judgment for plaintiff and defendant appeals. Reversed and remanded.

LAWRENCE E. BROWN, for appellant. MILO MOODY and S. L. SINNOTT, for appellee.

MAYFIELD, J.—This is an action under the homicide statute, to recover damages of the defendant for the wrongful death of appellee's intestate. The intestate was killed by one of the appellant's freight trains in the town of Scottsboro, Ala. The train which killed him was backing on a side track, for the purpose of leaving a tank of oil which was consigned to that station. Intestate was the agent of the oil company, the consignee of the tank of oil being delivered by the railroad, and was on the track for the purpose of designating the point on the side track at which the tank should be left, so that the oil could be stored in the tanks of the consignee. It was a disputed question, made so by both the pleading and proof, whether he was thus on the side track with the knowledge, consent, or request of the railroad company. This fact, of course, is an element to be considered in determining the duty which the defendant owed the intestate, and whether the handling and movement of the train on the occasion in question was negligent or wanton. It was also made a disputed question by the pleading and the proof whether the side track of the railroad at the place of the injury was so used by the public, by such numbers and with such frequency, as to impose on the defendant the duty of keeping a lookout for trespassers on the track at the point of the collision with intestate.

[Southern Railway Co. v. Fricks.]

This fact of frequent use, by great numbers of pedestrians, of parts of railroad tracks in populous districts, is an element which may enter into the question whether the handling and movement of trains at such used points is negligent or wanton; and this, even though the person so using the track may be trespassers.

(1) The case was tried on one count only, which was intended by the pleader, and treated by the trial court, to state a case of wantonness or willful injury. It was demurred to by the defendant, and a great number of grounds were assigned. Those chiefly insisted upon are to the effect that the count was treated and intended as a count for wantonness or willful injury, yet the facts alleged showed at best only simple negligence. The count is not as certain in this respect as it could be made; but we deem it reasonably certain in stating a cause of action as for wanton or willful injury. It alleges the facts that the intestate was on the track with the knowledge and consent of the defendant's agents, and that with such knowledge of intestate's danger and peril they did the acts alleged, in a wanton or willful manner, which proximately resulted in the injuries complained of. It contains, among others, the following allegations of fact, and conclusions: "The plaintiff alleges that at the time and place where her intestate was so run over and killed was a place of great frequency of travel by the public where people traveling along said track were wont to be passing in great numbers, known by the agents and servants of the defendant, and, knowing that plaintiff's intestate was going to be at such place to show said servants where to place said oil car, willfully, wantonly, or intentionally backed a car or train of cars back in on said side track at a high and dangerous rate of speed, without giving any warning by ringing the bell or blowing the whistle or other signal of intention to back in on said side track, and, without having any one at said point or on the rear of the train as it came back to give warning of its approach, ran against or over plaintiff's intestate and killed him, as a proximate consequence of said wantonness of said servants and agents of defendant."

(2) This we hold to be sufficient, under our liberal rules of pleading, to charge wantonness; and, there being no attempt to charge simple negligence, the defendant could not be, and was not misled as to its defenses to such count. The pleas of contributory negligence were therefore not availing or appropriate to this count; and, as it was the sole count on which trial was

[Southern Railway Co. v. Fricks.]

had, the court properly refused to instruct the jury as to the doctrine of contributory negligence.

Other charges were properly refused to the defendant, because they were calculated to mislead the jury as to whether or not contributory negligence would be availing as a defense.

The propositions of law announced above in this opinion have been so frequently reaffirmed that it is both useless and a waste of time and space to cite the decisions.

(3) The case must be reversed, however, because of rulings adverse to the defendant in allowing the plaintiff, over the defendant's protest, to prove the declarations of the engineer, made some time after the injury, which declarations were not a part of the *res gestæ*, and were therefore not admissible against his principal, this defendant. One of the recitals of the bill of exceptions as to such rulings is as follows: "Nute Bell, witness for the plaintiff, testified on rebuttal as follows: 'Just after the occurrence I detailed on the stand this morning, when this man was run over, I saw the engineer of the train. He was going back down to the train, going back down to the engine. He was just passing me talking to the railroad men.' Plaintiff's counsel then asked the witness this question: 'Did he make this remark on the occasion that day: "Damn him! he ought to have been run over; he ought not to have been on the track."'" Defendant's counsel objected to the question on the ground that it was immaterial, irrelevant, incompetent, and illegal and hearsay evidence, and not a part of the *res gestæ*, and not asked according to the predicate laid. The court overruled the objection, and defendant's counsel duly excepted. The witness answered: 'Yes, sir, I heard him say "Damn him! he ought to have been killed; he ought not to have been on the track."'"

The predicate laid for this evidence was as follows: "The plaintiff's attorney then asked the witness (engineer) this question: 'After that man was run down and after you got on your engine a few minutes afterwards, didn't you say to some brakeman on your train, and in the hearing of Nute Bell, make the remark that "Damn him! he ought to have been killed; he ought not to have been on the track?"'" Defendant's counsel objected to the question for the reason that no sufficient predicate had been laid; that it called for immaterial testimony, and was an attempt to prove the remark of the engineer and not a part of the *res gestæ*. The court overruled the objection, and the de-

[Southern Railway Co. v. Fricks.]

fendant's counsel duly excepted to the ruling of the court. Witness answered, 'No, sir; I did not make that remark.' The defendant's counsel moved to exclude the answer on the same ground assigned to the question. The court overruled the motion, and permitted the answer in evidence, and the defendant's counsel duly excepted."

(4) The trial court probably allowed this evidence on the theory that it was competent to impeach or discredit the witness of the defendant, by showing contradictory statements. This theory fails, however, for the reason that if the witness had in fact declared on the time and occasion inquired about, what the plaintiff's witness says he did, it would not be admissible or competent against his principal, this defendant. If the witness had been on trial, and his animus or feeling toward the deceased, living or dead, had been the subject of inquiry, his declarations as to such matters might be admissible. The rule in such cases was stated by this court in the case of *Smith v. State*, 183 Ala. 10, 62 South. 864. The distinction is that the declarant is not here on trial, and that the defendant is not responsible for, and cannot control, his words or actions, except as and when he is in the discharge of his duties, and when they form a part of the *res gestæ*. The rule in cases like the one before us is probably best stated in *Hawk's Case*, 72 Ala. 112, 47 Am. Rep. 403. In that case it is said:

"The objection to the testimony of the witness Allison should have been sustained. This witness was permitted to testify to the jury that, 'a few minutes after the plaintiff had been hurt, the conductor asked the engineer why he did not respond to the bell call; and the engineer answered that he did respond to all the bell calls he heard.' To the admission of this evidence the defendant duly excepted. The rule is well established that it is not within the scope of an agent's authority to bind his principal by admissions having reference to bygone transactions. The only ground upon which the admissibility of an agent's declarations can be justified is that they must have been made while in the discharge of his duties as agent, and be so closely connected with the main transaction in issue as to constitute a part of the *res gestæ*.—*Mobile & Mont. R. R. Co. v. Ashcraft*, 48 Ala. 15; *Tanner's Ex'r v. L. & N. R. R. Co.*, 60 Ala. 621; *Robinson v. Fitchburg & W. R. R. Co.*, 7 Gray (Mass.) 92; *Baldwin v. Ashby*, 54 Ala. 82; 1 Brick. Dig. p. 63, §§ 160-162. * * * In *Luby*

[Southern Railway Co. v. Fricks.]

v. Hudson River R. R. Co., 17 N. Y. 131, *supra*, the declarations of the driver of a street car, made after an accident had occurred and the car had been stopped, but before he had left it, to the effect that he could not stop the car because the brakes were out of order, were ruled to be mere hearsay and inadmissible. In *Adams v. Hannibal, etc., R. R. Co.*, 74 Mo. 553, s. c. 41 Amer. Rep. 333, the court, for a like reason, excluded the declarations of the engineer and fireman of the train, made immediately after the deceased was struck and the train was stopped, showing that the accident was occasioned by the negligence of the engineer. The case is clearly analogous to the present one, and the views of the court, after a clear and instructive review of the cases, fully accord with the conclusion reached by us, and the reason upon which that conclusion is based. Our conclusion is that the declarations of the conductor and engineer cannot, under a proper application of these principles, be regarded as a part of the *res gestæ* of the accident resulting in the injury to plaintiff. The time—'a few minutes'—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete.—Thompson on Carriers of Passengers, pp. 557-8."

Declaration of a fireman to the engineer, immediately after running the engine over a mule, "You knocked one off on this side," is not admissible against their principal, unless it was a part of the *res gestæ*.—*Railroad Co. v. Sistrunk*, 85 Ala. 353, 5 South. 79.

Agents or officers of companies cannot bind such companies by admissions or declarations as to past transaction.—*Railroad Co. v. Davis*, 91 Ala. 621, 8 South. 349; *Railroad Co. v. Cogsbill*, 85 Ala. 456, 5 South. 188; *Railroad Co. v. Carl*, 91 Ala. 272, 9 South. 334; *Danner v. Stonewall Co.*, 77 Ala. 184.

Declarations of a depot agent that plaintiff's goods were burned up in the car are not admissible against the agent's principal, when sued for the goods.—*Railroad Co. v. Carl, supra*.

For the error indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J.. and SOMERVILLE and THOMAS, JJ., concur.

[Beatty v. Palmer.]

Beatty v. Palmer.

Automobile Accident.

(Decided January 13, 1916. Rehearing denied March 23, 1916.
71 South. 422.)

1. **Attorney and Client; Conduct of Counsel; Presumption.**—Good faith of counsel will be presumed in the absence of tangible indication to the contrary.

2. **Trial; Conduct of Counsel; Qualifying Jurors.**—A request and its allowance that the jurors be qualified on the point as to whether they were interested in the indemnity company, attorney for plaintiff stating that he understood that an indemnity company was interested in the case, was not erroneous, since it was not sufficient to create bias.

3. **Appeal and Error; Review; Scope.**—Argument on appeal of questions as to the sufficiency of a replication, not raised by the demurrer thereto will not be considered.

4. **Release; Rescission; Tender; Time.**—Where plaintiff was injured and made a release of his injuries, and in a suit for the damages instituted thereafter, set up mental incapacity, and that as soon as he reasonably could after discovery of the alleged settlement and release he made a tender to defendant of the sum paid, he sufficiently alleged tender at the earliest practicable moment.

5. **Same; Pleading.**—Where the action was for damages for personal injuries, and the defense was a release and settlement, a replication thereto alleging that at the time of the making of the release on account of plaintiff's weak mental and physical condition, and the use of medicine in the treatment of his injuries, he did not have the mental capacity to make such settlement, and was incapable of knowing and appreciating the extent of his injuries, sufficiently alleged that he did not know and appreciate the contents of the release so as to show fraud in securing it.

6. **Appeal and Error; Review; Matters Not Argued.**—The court will not consider on appeal questions raised by demurrer in the court below, but not argued or insisted on on appeal.

7. **Release; Rescission; Tender.**—An offer to return money paid under an alleged fraudulent release if within a reasonable time after discovery of the fraud, although rejected, is as effectual to rescind the release as if accepted, if the plaintiff so considered it, and if, in his subsequent action the compromise was sustained, he would hold the same by a valid transaction, and, if declared invalid, the sum so held should be set off against the amount allowed.

8. **Same; Evidence.**—In such an action, it was immaterial what plaintiff did with the money received in consideration of the release after he had tendered the money to defendant, and it had been rejected.

9. **Same.**—Where the action was for personal injury and suit was instituted after plaintiff had attempted to rescind the release by a tender of the

[Beatty v. Palmer.]

money paid under it, and plaintiff alleged that the release was fraudulently obtained, plaintiff was entitled to great latitude in examining the agent who obtained the release on the issue as to whether he represented defendant or an indemnity company, the witness having stated that he represented defendant.

10. **Same; Jury Question.**—Under the evidence in this case it was a question for the jury whether the release was fraudulently obtained, and whether at the time plaintiff was incapable of making the contract.

11. **Same; Evidence.**—Where the action was for personal injuries, and the defense was a release, the replication setting up a rescission of the settlement by a tender of the money paid thereunder, and fraud, the admissibility of the character of the agency and of the identity of his principals must be tested, not by its intrinsic force, but by its tendency in connection with the other evidence to show an interest in such agent in securing the alleged fraudulent settlement.

12. **Same; Time; Burden of Proof.**—Where the action is by plaintiff after an attempted release in damages with replication as to an attempted rescission of the release for fraud, and by tender of the money paid, the burden is on plaintiff to show the reasonable promptitude of his offer to rescind if it is denied by defendant.

13. **Same.**—Where it is shown that defendant and her husband were absent from their residence for sometime after a release of plaintiff's claim, letters from plaintiff's attorney seeking to rescind such settlement and release were admissible on the issue of prompt action to rescind.

14. **Trial; Reception of Evidence; Portions.**—Where a portion of a letter introduced in evidence is irrelevant, a general objection to the admission of the entire letter does not present the question of the admissibility of the particular portion.

15. **Evidence; Matters Introduced by Other Parties.**—Where defendant set up a release from liability negotiated by an agent of an indemnity company in which she was insured, she could not complain that plaintiff's attorney inquired if she was insured in such company, as she had opened up that issue herself.

16. **Release; Rescission.**—Testimony of the agent of plaintiff as to his authority to make a tender of the money paid in an attempt to rescind the release, was properly admitted.

17. **Same; Time of Acceptance.**—Where a defendant frequently rejected a tender of money made in an attempt to rescind an alleged fraudulent release, defendant could not alter her status by offering on the trial to accept the money and demanding its return.

18. **Evidence; Opinion.**—Where a witness had given special attention to tracking automobiles by the marks of their tires, the admission of his opinion as to the identity of an automobile which he tracked was not erroneous.

19. **Trial; Jury Question.**—The weight and value of opinion evidence is a matter to be determined by the jury trying the case.

20. **Charge of Court; Construction.**—Where the charge as a whole correctly and fairly submitted the matters in controversy, it will not be held to be erroneous although isolated portions thereof are abstract and somewhat misleading.

[Beatty v. Palmer.]

APPEAL from Birmingham City Court.

Heard before Hon. A. H. ALSTON.

Action by J. B. Palmer against Mrs. Maibelle Beatty. Judgment for plaintiff, and defendant appeals. Affirmed.

It appears that plaintiff was a traveler along the street on a motorcycle, and that defendant was driving in an automobile, possibly on the wrong side of the street, and ran into plaintiff, inflicting the injuries alleged; some of the counts stating the cause in simple negligence, and some as for willful or wanton injuries. The pleas of contributory negligence were, in effect, that plaintiff, while riding a motorcycle, negligently and without looking, ran the motorcycle on or against defendant's automobile, thereby proximately contributing to the injuries complained of. The release signed by the plaintiff was in consideration of \$200, and was set up by special plea; the release being set out in full. The substance of the replication sufficiently appears. The objections to the qualifications of the jurors, and the questions propounded, and the action of the court thereon sufficiently appear. The testimony of the witness Bodeker was asked relative to his experience in attempting to track criminals on paved streets.

PERCY, BENNERS & BURR, and WHITAKER & NESBITT, for appellant. ALLEN, BELL & SADLER, for appellee.

SAYRE, J.—Much of the brief for appellant, defendant in the court below, has been addressed to the alleged error of the trial court in allowing the plaintiff to parade before the jury the fact that defendant was protected by an indemnity policy in an insurance company; the inference being that by reason of such indemnity the jury, prone to discriminate between corporations and parties of flesh and blood to the prejudice of the former, would be inclined to treat the insurance company as the real defendant in the case. We have been unable to find from the record that plaintiff was allowed to travel outside the bounds of propriety or strict right. And with reference to the closely connected subject of the court's action in overruling a motion for a new trial, made on the ground, among others, that the trial was conducted in a way to prejudice the rights of defendant, we will say just here that, while the record discloses some friction between the court and counsel for defendant, the truth concerning

[Beatty v. Palmer.]

its origin and the manner of its demonstration on either part is so obscurely reflected by the cold type before us that it would require an exercise of the imagination to hold that it probably affected the jury unfavorably to defendant, or at all. On the evidence plaintiff's case was clearly one for jury decision, and, if plaintiff was entitled to recover, the amount awarded by no means appears to be an exaggerated compensation for the injuries suffered. There is nothing in the verdict or elsewhere in the record to show that defendant had not a fair trial, or that the result was affected by passion, prejudice, or other improper influence operating upon the jury.

(1, 2) At the opening of the trial plaintiff's attorney stated to the court in the presence of the jury that he understood some indemnity company was interested in the case, and requested that the jury be qualified on the point whether or not any of them had any interest in any such company. Defendant objected to the statement of what plaintiff's attorney understood, and, her objection being overruled, she duly excepted. She also objected to the jury being qualified as proposed, and, this objection being overruled, she again excepted. Thereupon the court asked the jury whether any of them were interested in any indemnity company. No reply coming from the jury box, the court pronounced the jury qualified.

Defendant complains here that this proceeding was improper altogether, as calculated to prejudice her defense, and that in any event there was error in qualifying the jury by this inquiry without some proof that an indemnity company was interested. In *Citizens' Company v. Lee*, 182 Ala. 561, 62 South. 199, this court held that it was not improper to qualify the jury in respect of their connection with or interest in any indemnitor the defendant might have; due care being exercised that nothing be done or said to create bias or excite prejudice in the minds of jurors who were not disqualified. In that case plaintiff made proof that defendant had an indemnity contract with an insurance company. We are disposed to be careful on this point; but, the right conceded, and the good faith of counsel presumed, as it must be on the absence of some tangible indication to the contrary, we hardly see how the right to have the jury qualified could have been more inoffensively asserted. The taking of proof, the examination of witnesses, could only have served to press the point upon the jury's attention, and thus more fully to develop the bias

[Beatty v. Palmer.]

or prejudice against which defendant thought it necessary to take precaution by the objections she interposed. Counsel might well have omitted the statement that he understood some indemnity company was interested in the case. But in view of the ruling in *Citizens' Company v. Lee, supra*, where proof was taken, we think this statement could hardly have been understood by court or jury as anything more than an offer to introduce testimony, if demanded; and, if the court at that stage of the case had gone into the question whether defendant was protected by an indemnity contract, plaintiff would have been entitled to prove that his understanding as to the fact was correct, and later developments made it highly probable that he would have offered the evidence to which, when offered later in another connection, defendant interposed strenuous objection. Upon the whole we do not see that this matter could have been better managed in the trial court.

Plaintiff's suit was for damages for personal injuries alleged to have been inflicted by defendant in the negligent operation and management of her automobile on a public highway. Defendant pleaded the general issue, contributory negligence, and a plea of composition and release. To this last plea plaintiff replied, specially alleging, in effect, that at the time of said composition and release, by reason of his weak mental and physical condition and the use of medicines in the treatment of his injuries, (replication 2) he did not have the mental capacity to make said settlement, (replication 3) he was incapable of knowing or appreciating the extent of his said injuries, and (both replications) that defendant's agent, knowing his condition, induced and unduly influenced plaintiff to make said settlement and accept a sum grossly less than would have been a fair and just compensation—a species of fraud. These two pleadings also alleged that plaintiff, so soon after the discovery by him of the alleged settlement as he reasonably could, tendered or caused to be tendered to defendant the sum so received, which defendant refused to accept.

(3, 4) The argument against these replications is more searching than the questions stated in the demurrers filed in the court below. It is said here that the third replication, while alleging that plaintiff was incapable of knowing or appreciating the extent of his injuries, fails to allege that he did not know and appreciate the contents of the release. Without intending to

[Beatty v. Palmer.]

intimate that there was any merit in this contention, it will suffice to say that the demurrer did not take the point. It is further said of both special replications that they did not show that the right to rescind was exercised at the earliest practical moment. The demurrer was that plaintiff did not appear to have acted promptly in rescinding the contract of settlement. In *Stephenson v. Allison*, 123 Ala. 439, 26 South. 290, the language of the court, adopted from the Supreme Court of New York, was that the party defrauded must disaffirm at the "earliest practical moment" after discovering the fraud. At one point in *Birmingham Ry. Co. v. Jordan*, 170 Ala. 530, 54 South. 280, this phrase was repeated, but at another place in the same opinion the expression was "reasonable time." In *Barnett v. Stanton*, 2 Ala. 181, a case involving the rescission of a contract of sale of personal property by an offer to return the chattels sold, the court said that the party who would rescind must act promptly, or, as the court put it elsewhere in the opinion, and as our other cases and the authorities generally put it, the right to rescind must be exercised within a reasonable time, i. e., with due promptitude after the fraud is discovered, or might have been discovered by the use of due diligence.—*Whitworth v. Thomas*, 83 Ala. 308, 3 South. 781, 3 Am. St. Rep. 725; *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Hayes v. Woodham*, 145 Ala. 597, 40 South. 511; *Comer v. Franklin*, 160 Ala. 573, 53 South. 797; 9 Cyc. 435, and note 69. We consider that there is no substantial difference between the cases on this point, nor any between the measure of promptness alleged in the replications and that asserted by the demurrers.

(5) These replications also sufficiently showed that plaintiff's mind was in such unsound condition as to render him incapable of making a binding contract.—*L. & N. R. R. Co. v. Huffstutler*, 162 Ala. 619, 50 South. 146.

(6, 7) Defendant also demurred to these special replications on the ground that the alleged tender was not shown to have been kept good. The assertion of the demurrer is reiterated in the brief, where it touches the sufficiency of the replications, but there is no argument, and under our rule we might pretermit consideration of it; but much the same question was raised by objections to evidence, which have been argued, and may as well be disposed of at this point. These replications did not plead the tender—it may be more aptly designated as an offer

[Beatty v. Palmer.]

to return the money—as a discharge of debt or liability, in which case a tender must be kept good, since the debt or liability remains, although the tender be refused. They set up the tender as a fact sufficient in itself to effect a rescission of the contract of release and to restore plaintiff's original cause of action. The offer, if made within a reasonable time after the discovery of the fraud, though rejected, was just as effectual to rescind the contract of release as if the defendant had accepted it, if the plaintiff chose to so consider it.—*Barnett v. Stanton, supra*; *Samples v. Guyer*, 120 Ala. 611, 24 South. 942; *Hayes v. Woodham, supra*; *Comer v. Franklin, supra*. Thereafter the capacity in which plaintiff held the money depended upon the result of his suit. In the event the compromise was sustained, he would retain the money by virtue of a valid transaction. If the settlement was rescinded, the amount received in the settlement might be deducted from the damages assessed, as the court directed—in effect, a return of the money paid for the release; or, if by any chance the sum so paid had exceeded the amount of recoverable damages, then plaintiff would hold the difference as an involuntary bailee for the defendant. In these circumstances, though it be assumed that defendant could have shown that plaintiff used the money for his own benefit after defendant refused to accept it as upon a rescission of the release, it would be contrary to justice to regard such use as conclusive against plaintiff, if, as he alleged, there had been no intelligent and valid settlement of his claim for damages. Cases cited in the brief for defendant (appellant) will be found on analysis to hold nothing to the contrary. In *Birmingham Ry. Co. v. Jordan, supra*, there was never any rescission, for the reason that there was never at any time an offer to restore the money plaintiff had received in settlement of the claim she was suing. So in *Harrison v. Ala. Midland*, 144 Ala. 256, 40 South. 394, 6 Ann. Cas. 804, and *Birmingham Ry. v. Hinton*, 158 Ala. 470, 48 South. 546. In *Kelly v. L. & N. R. R. Co.*, 154 Ala. 576, 45 South. 906, the tender had been delayed for years. Other cases dealt with the right to rescind, and the question of waiver, after the discovery of fraud, but before the offer to restore, by delay or dealing with chattels the title to which passed by the transactions in litigation. We have also some cases in which the party offering to rescind waived the rescission, once accomplished on his part by a seasonable proper offer, by subsequently dealing with the property as his own. But these

[Beatty v. Palmer.]

cases, involving the passage of the legal title to specific chattels back and forth between the parties—not money, in which case one dollar is in law the equivalent of any other dollar—and depending for solution upon the final situs of the title as determined by the conduct of the parties, were not complicated by any questions as to the compromise and release of mere monied demands.

(8) Assignments of error from 38 to 42, both inclusive, are based upon rulings by which the court denied to defendant the right to go into the question as to what plaintiff did with the money after he had offered to return it and defendant had refused to receive it. Under the foregoing principles of law these rulings were free from error.

(9, 11) On cross-examination of a witness for defendant plaintiff was allowed to develop the fact that at the time of the alleged contract of compromise and release the witness had in that matter represented the General Accident & Fire Insurance Company. This is assigned for error. The witness had negotiated the alleged settlement with plaintiff. On his direct examination he had testified that he had told plaintiff that he represented Mrs. Beatty and her husband; that they regretted the accident, and were willing to assist him in bearing his expenses at the hospital to which he had been removed for treatment. But defendant, testifying as a witness in her own behalf, had denied that witness had any authority at the time to represent her in that transaction. A plea had been filed alleging that the cause of action had been settled and released by plaintiff in consideration of \$200 paid by Mr. and Mrs. Beatty. To this, as we have seen, plaintiff replied that the release had been procured by fraud in legal effect. There was evidence from which the jury may have found that plaintiff was at the time incapable of making an intelligent agreement. The jury may have inferred also that the witness negotiated the settlement, whomsoever it was intended to benefit, under circumstances that urgently suggested the propriety of its postponement to a more convenient season. These, under the evidence, were questions for the jury. On the issue of fact thus presented plaintiff was entitled to great latitude in the production of evidence, especially so in the cross-examination of this witness.—*Mann v. Darden*, 171 Ala. 142, 54 South. 504. The admissibility of the fact elicited was not to be tested by its own intrinsic force, but by its bearing in connection with all other evidence in the cause having any relation to the same

[Beatty v. Palmer.]

point—*Snodgrass v. Branch Bank*, 25 Ala. 174, 60 Am. Dec. 505; *Nelms v. Steiner Bros.*, 113 Ala. 562, 22 South. 435. Plaintiff not only was entitled to show that the witness did not represent the defendant, but to show that he was acting for some person having an interest to be affected as tending to shed light upon his motive and purpose in negotiating the compromise under the circumstances in evidence. Defendant, though she denied that the witness had acted by her authority in procuring the release, was relying upon the instrument, and the jury were entitled to know every circumstance tending to disclose the true inwardness of that transaction. Defendant might have avoided any involvement with the motive and purpose of the person for whom the compromise was negotiated by refusing to plead the release. Having pleaded it, she assumed the burden of every infirmity that attached to it by reason of the circumstances in which it was negotiated.

(12-14) Under the pleadings the burden was on plaintiff to show the reasonable promptitude of his offer to rescind. In connection with proof of the absence of Mr. and Mrs. Beatty from their place of residence shortly after the accident the letters addressed by plaintiff's attorneys to them, and offered in evidence, were properly admitted as tending to show diligence in the offer to rescind. If the last expression contained in the letter to defendant was considered to be irrelevant and hurtful, defendant should have moved to exclude that part of it. Instead, her objections were taken to the letters in their entirety.—*L. & N. R. R. Co. v. Britton*, 163 Ala. 168, 50 South. 350. Many cases might be cited to this point.

(15) *Watson v. Adams*, 187 Ala. 490, 65 South. 528, to which counsel for appellant gratefully refers as a return after many days of bread cast upon the waters, does not sustain their position here. In that case it was held for reversible error that the court permitted a cross-examination of the defendant which, as the court found, had for its object the introduction to the jury of wholly illegal evidence to the effect that an indemnity company was defending, in defendant's name, against liability for the wrong of which the plaintiff complained; whereas in the case at bar defendant opened the way for every question asked by plaintiff on the point when she pleaded, and relied upon a release purporting to have been executed to her, but which was, in fact, negotiated by the indemnity company without her authority or

[Beatty v. Palmer.]

knowledge and under circumstances, according to tendencies of the evidence for plaintiff, that impeached its validity. The record here does not show that plaintiff laid any greater stress upon the subject than the legitimate needs of his case justified.

(16, 17) We do not think it is to be doubted that offers were made to return the money to defendant, to her husband, and to the indemnity company, plaintiff being then in doubt as to whom the tender should be made, or that the tender was refused on every hand. Nor do we see that there was error in allowing the witness Sadler, who made these tenders, to state what authority he had for making them for the head of the firm of attorneys having charge of plaintiff's case. Defendant's offer at the trial to accept the money, and her demand for its return came too late to affect the status of right fixed by her previous refusal, if, indeed, she had color of right to it in any aspect of the case.

(18, 19) No error was committed in the examination of the witness Bodeker. The matter about which he gave his opinion was an ordinary one; but he had given special attention to the subject, and it was quite possible for him to have a better knowledge of it than the average man who had given it no thought.—*Staples v. Steed*, 167 Ala. 241, 52 South. 646, Ann. Cas. 1912A, 480. The value of the witness' opinion was a matter for consideration by the jury.

(20) Exceptions to parts of the court's oral charge to the jury do not require separate treatment. They have been examined with due care without finding reversible error. If it may be said that some expressions which have been culled from the charges were abstract, as where the court, when stating the law of plaintiff's alleged contributory negligence, said, in effect, that plaintiff's contributory negligence would bar a recovery, "even though defendant was not on the proper side of the street," and in some fragmentary expressions thus isolated from their context be found to have involved some misleading tendencies in their statements of the law of the case, still the charge, when considered as a whole, laid the case and all its issues very fairly before the jury, and we find in it no sufficient reason for a reversal.

We have stated our consideration of all matters of importance assigned for error. Finding no reversible error, the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

[Alabama Great Southern Ry. Co. v. Smith.]

Alabama Great Southern Ry. Co. v. Smith.

Crossing Accident.

(Decided January 13, 1916. Rehearing denied March 23, 1916.
71 South. 455.)

1. **Railroads; Crossing Accident; Burden of Proof.**—Where the complaint charges wantonness in bringing about the death at a railroad crossing the provisions of § 5476, Code 1907, are without application, and, in such case, the burden is on plaintiff throughout the trial to sustain the allegation of wantonness.

2. **Same; Contributory Negligence.**—Where a deceased, on hearing the approaching train, stopped as if to wait for the train to pass, and then, after looking in the direction from which the train was coming, started to cross the track when the train was about 100 feet away, and the danger was imminent, such deceased was guilty of contributory negligence which deprived his representative of the right to recover on account of any alleged prior negligence of defendant.

3. **Same; Assumption that Danger Would be Avoided.**—Where deceased stopped before going on the crossing as if to await the passing of the approaching train the engineer had the right to assume that deceased would stay in a place of safety.

4. **Same.**—Where deceased stopped on approaching a railroad crossing as if to wait for a train to pass, and then went upon the crossing and was killed, the burden of proof is on plaintiff to show negligence on the part of the engineer after deceased left his place of safety to go upon the track.

5. **Same.**—The provision of § 5476, Code 1907, are without application where the person hit at the crossing was guilty of contributory negligence, as he was in no better case than a trespasser whose peril and presence had been discovered.

6. **Same; Last Clear Chance.**—Where deceased, after stopping to wait for a train to pass, left his place of safety to cross the track when the engine was from seventy-five to one hundred feet away, and the engineer did everything in his power to stop the train, the doctrine of last clear chance has no application, and plaintiff could not recover for negligence subsequent to the discovery by the engineer of the fact that deceased would try to cross in front of the approaching train.

7. **Same; Wantonness.**—In such a case plaintiff could not recover on the ground of wantonness subsequent to the discovery by the engineer of the fact that deceased would try to cross in front of the approaching train.

8. **Witnesses; Bias.**—Notwithstanding the jury is not bound to accept the testimony of a biased witness without reserve, yet the testimony of a witness may not be capriciously rejected.

9. **Railroads; Crossing Accidents; Evidence.**—The evidence in this case examined and held not sufficient to sustain a verdict for the plaintiff.

[Alabama Great Southern Ry. Co. v. Smith.]

10. **Pleading; Inconsistent Allegation.**—A complaint is not rendered demurrable because it contains two counts, one charging simple negligence and the other wanton.

11. **Railroads; Crossing Accident; Wantonness.**—Wantonness does not, as a matter of law, grow out of passing at great speed over a populous crossing at grade, but depends upon its reasonableness as measured by conditions to be reasonably anticipated.

12. **Same; Instruction.**—In such an action an instruction that to constitute wantonness, the actual presence of the person injured or killed need not actually be known to those operating a train, although correct in itself, was misleading when coupled with the statement that wantonness consists in passing at great speed over popular crossings at grade.

APPEAL from Birmingham City Court.

Heard before Hon. A. H. ALSTON.

Action by Mrs. Mary M. Smith, as administratrix, against the Alabama Great Southern Railroad Company, for damages for the death of her intestate. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The facts sufficiently appear from the opinion. The complaint avers that defendant was operating a line of railroad across and on grade with a public highway in the city of Birmingham, and while plaintiff's intestate was upon said highway at a point near Beverly station in said city, said train ran upon or against him, and so injured him that he died. The first count alleges the negligence as follows: Defendant negligently conducted itself in that regard, and as a proximate consequence of said negligence, said train ran upon or against plaintiff's intestate, on the occasion aforesaid, and proximately caused his death.

The second count alleged the negligence as follows: Defendant's servant or agent, upon said train, acting within the line and scope of his employment and authority as such servant or agent, wantonly on the occasion aforesaid, by means of said train, caused the death of said intestate.

The following is charge 12 given for plaintiff: While wantonness grows out of passing at a great rate of speed over a populous public crossing on grade with a railroad, it is not necessary to the completion of such wantonness that the actual presence of the person injured or killed thereby, if one is killed or injured, should have been actually known to those operating the train.

A. G. & E. D. SMITH, for appellant. HARSH, HARSH & HARSH, and FRANK W. SMITH, for appellee.

[Alabama Great Southern Ry. Co. v. Smith.]

SAYRE, J.—Appellee's decedent was killed by defendant's train about half past 4 on April 21, 1914, at the Beverly crossing. The place in question was in one of the outer districts of the city of Birmingham, where there were only a few buildings scattered around, but it was where Jefferson street, sometimes referred to as the old Tuskaloosa Road, the main thoroughfare between Birmingham and Bessemer, crossed defendant's main line at grade, and the evidence goes to show that it was a crossing much used by persons passing on foot and in vehicles. On the trial of plaintiff's (appellee's) suit, brought under the Homicide Act, there was verdict and judgment for plaintiff, damages being assessed at \$6,500, and from that judgment defendant has appealed, assigning for error, among other things, the action of the court in overruling its motion for a new trial.

All the evidence upon which the jury acted is before us. We have not visited the locus in quo, as did the jury under the court's permission and direction, but a carefully prepared map, drawn to scale and purporting to show street crossings, buildings and street car lines in the immediate vicinity, has been reproduced in the transcript of the bill of exceptions. The accuracy of this map has not been questioned, nor does it disclose any points of difference from the testimony of witnesses many of whom referred to it, thus, and otherwise, locating objects in the neighborhood. There is therefore not the slightest reason for assuming that the jury saw anything which might affect that view of the case which has been forced upon us by what we consider to be quite plain considerations of law and justice.

Weighing the evidence with all proper deference for the jury's findings and for the judgment of the trial judge permitting the verdict to stand, without impeaching the deliberate material testimony of a single witness, drawing only such inferences as a reasoned reflection upon the logic of undisputed facts has rendered necessary, we have learned the relevant material facts involved in the death of plaintiff's decedent as well as any appellate court can ever hope to learn the facts of such a case, and they have produced in our mind a conviction that the verdict was founded upon some erroneous conception in the minds of the jury going to the substantial merits of the cause.

(1) Only three of the witnesses introduced by plaintiff saw the accident. It so chanced that two of them saw deceased only just a moment before he was struck by defendant's engine, the

[Alabama Great Southern Ry. Co. v. Smith.]

attention of one of them being attracted by some one saying in a stressful voice, "He can't make it," or "He won't make it." Both these witnesses testified that deceased was on the track when they saw him—one of them saying that "he appeared to be in a hurried gait all right, and the train was right at him, only a few feet from him;" the other, that "when I first saw him he was making his run to get across the track, and when I first saw the train the train was about 30 feet from him." The third of these witnesses, a negro woman, said, "I saw it strike Mr. Smith." She had noticed deceased when he was close to the railroad, but did not undertake to describe his movements upon or immediately before going upon the track. Aside from proving the death of plaintiff's decedent, which was not disputed, the testimony offered by plaintiff appears to have had for its purpose to show that the crossing was in general much used by pedestrians and vehicles, that the train on that occasion was moving with unusual speed, and that no signals of approach were sounded by blowing the whistle or ringing the bell as the statute requires. It may be noted, however, that the weight even of plaintiff's evidence went to show that the whistle was blown sufficiently to put any person near the crossing and in the use of normal faculties on notice that the train was approaching. The only effect, then, to be ascribed to plaintiff's evidence is, that by virtue of the statute it made out a *prima facie* case of simple negligence under the first count of the complaint. As for the second count charging wantonness, the statute in reference to the burden of proof in cases of death or injury at such places gave no help to it, and the burden of proof as to it rested upon plaintiff consistently throughout the trial.—*Carlisle v. A. G. S. Ry. Co.*, 166 Ala. 591, 52 South. 341.

We come now to the evidence adduced by defendant. The overwhelming weight of this evidence, considered in connection with that offered by plaintiff, went to prove that the whistle was blown and the bell rung. It tended very strongly also to show that the train moved over the crossing at a rate of speed not in excess of the daily average speed at that point. In other respects it was not in conflict with any part of the testimony offered by plaintiff. But it went further, giving a new element, and involving new issues, as to which defendant's evidence was without conflict and had substantial collateral corroboration in the testimony of the witnesses who testified for plaintiff.

[Alabama Great Southern Ry. Co. v. Smith.]

(2) This change in the complexion of the case arose out of the following facts: Plaintiff's decedent approached defendant's track from the north intending to cross over to the south. The point where he intended to cross, and toward which he went, was in the mist of a broad open space affording him ample opportunity for seeing the approaching train while it was yet 800 feet and more, and he more than 100 feet, away from the crossing. The engineer testified that he saw deceased when his engine was 800 feet from the crossing. The track was straight and single for more than that distance, and the view considerably more expansive than the right of way. Deceased had alighted from a street car at the Beverly station at the same time with a boy about 17 years of age. This street car line at that point came within something like 100 feet of defendant's line and then curved away to Bessemer. The boy was going in the same direction with deceased, and together they came near to the defendant's track. They both stopped. The boy heard and saw the train. To indulge the inference that deceased was not aware of its approach would be to disregard the common facts of human experience and the only reasonable inference to be drawn from ample evidence, in addition to that of the boy and the engineer, showing his actions at the time. The engineer testified that plaintiff's decedent stopped 10 or 12 feet from the track, and though there were such small differences as usually earmark the truth of evidence to such a point, the great weight of the testimony of a number of witnesses corroborated the engineer on this point. There was no serious difference about it. Stopping, deceased set a bag or bundle he was carrying on the ground. One of the witnesses said that he set it on the railing of the walk or footbridge over which he had come, the end of which was at hand. This could have meant but one thing to the engineer. After looking in the direction from which the train was coming, deceased picked up his bag or bundle and started hurriedly across the track. Most of the witnesses for defendant who testified to this point say he started to run across. The boy was most emphatic on this point. All of those who saw deceased at the time testified in substance that his manner of crossing was hurried.* In this respect defendant's witnesses had substantial corroboration in the testimony of the witnesses for plaintiff to whom we have referred. There can be no sort of doubt about the fact that deceased hurried across the track, nor can anything be clearer than that this

[Alabama Great Southern Ry. Co. v. Smith.]

was an act of gross negligence on his part, depriving him of every semblance of right to recover on account of any alleged prior negligence on the part of the engineer.

(3) Conceding that there was a modicum of evidence tending to support the theory that the engineer had previously been negligent in running his train at an excessive rate of speed and without due signals of approach, and, in any event, that such facts as were not in dispute had the effect under the statute to put upon the defendant the burden of proving that there was no original negligence on its part, still, in the situation thus in every material particular fully, clearly, and undisputedly developed and established by the evidence for defendant, the engineer's alleged prior negligence became for all the just and proper purposes of the case a negligible quantity. The crossing was not a stopping place for the train; daily it was operated over that crossing at a speed of 30 to 40 miles an hour; the engineer saw deceased approaching the train, but he saw him stop as if to wait; he thus had a right to assume that deceased would stay in the safe place where he was; and until he started again there was no reason why the engineer should adopt measures to meet so improbable an emergency as was presented when deceased began to hurry into a place of extreme and most obvious danger.—*Birmingham Ry. Co. v. Bowers*, 110 Ala. 328, 20 South. 345. In this undeniable posture of the case, it must be treated, so far as the question of simple negligence is concerned, as if it had been originally instituted upon the sole theory and claim that the liability of defendant arose out of actionable negligence on the part of the engineer subsequent to his discovery of the fact that plaintiff's decedent would leave his place of safety to go upon the track.—*Helms v. C. of Ga.*, 188 Ala. 393, 66 South. 470.

(4, 5) The only remaining question then, so far as the charge of simple negligence is concerned, is whether the evidence upon the whole afforded any reasonable inference other than that the engineer, after discovering that deceased was, or would put himself, in a position of peril, failed to exert himself promptly and by every means at hand to avert the consequences of the danger into which deceased thus recklessly intruded. On this issue the burden of proof was on the plaintiff. It is of no consequence in this connection whether his decedent may or may not with technical accuracy be referred to as a trespasser; he was guilty of gross negligence; he was clearly in the wrong in going upon the

[Alabama Great Southern Ry. Co. v. Smith.]

track as he did; he probably became thereby a trespasser, for it was his duty to know, and evidently he did know, before he made the attempt to cross, that the train was approaching in such proximity as to render the undertaking dangerous.—*Glass v. M. & C. Ry. Co.*, 94 Ala. 581, 10 South. 215. He was in no better case than a trespasser whose presence and peril have been discovered, and the statute no more applied to him than it does to a trespasser.—*L. & N. R. R. Co. v. Jones*, 191 Ala. 484, 67 South. 691; *L. & N. R. R. Co. v. Rayburn*, 192 Ala. 494, 68 South. 356; *Empire Coal Co. v. Martin*, 190 Ala. 169, 67 South. 435.

(6, 7) The engineer's testimony was that when deceased started upon the track, the engine being then about 75 feet from the crossing, "maybe a little more"—in his testimony at the coroner's inquest he had described the distance as being 100 feet—he "slammed on emergency" and did everything else possible to stop the train; that it was impossible to have stopped the train or slackened its speed more than he did. If this was true, plaintiff could not recover for negligence or wantonness subsequent to the engineer's discovery of the fact that deceased would try to cross in front of the approaching train. By way of showing some circumstances in contradiction the brief for appellee refers to that part of the testimony of the engineer in which he said that he saw the parties (by which he meant deceased and the boy with him) when he was 800 feet from the crossing, but that he did not put on brakes until he was within 75 feet of them. But this excerpt from the record is wholly misleading, for the record shows the engineer's testimony to be that when he saw deceased and the boy 800 feet away, deceased was not on the track, nor had he and the boy stopped; they were on the walk approaching the track in close proximity to which they afterwards stopped. The boy did not go upon the track. He waited for the train to pass.

Reference is also made to the testimony of Richie, the witness to whom we have heretofore referred as saying that his attention was attracted by hearing some one say in a stressful voice that he (deceased) could not or would not make it. This witness testified, and this part of his testimony the brief quotes, supplying italics: "The train picked him up on the base beam, I would call it, across the front of the engine where the cow-catcher is fastened in the side, *and he fell off as soon as the brake was set up and stopped the force of the engine.*"

All the evidence tended to show that the body of deceased was carried 100 feet before it fell off the engine, this distance

[Alabama Great Southern Ry. Co. v. Smith.]

being easily determined by reference to the spot where it lay immediately after the accident. The testimony quoted last above is supposed to show, that the engineer failed to set the brakes until the train reached the point where the body of deceased fell to the ground. But this testimony at best for appellee shows merely the inference, opinion, or conclusion of the witness, bald and of little or no consequence in the circumstances, to the effect that at the point in question the speed of the train had so far slackened as to relieve the atmospheric pressure created by its motion, which, it may be conjectured, had something to do with keeping the body on the front of the engine.

Appellee also refers to some testimony to the effect that the train moved about a quarter of a mile after passing the crossing; this, we suppose, as tending to prove that no prompt, timely, and efficient effort was made to check the speed of the train. We do not know, and so far as the evidence gave the jury to understand, they did not know, in what distance the train might have been stopped in the conditions prevailing. The fact, if accepted according to appellee's contention, may as well have tended to show the great original speed of the train, and great speed, in view of the uncontradicted evidence as to the actions of deceased and the circumstances in which he went upon the track, could only tend to relieve defendant of the imputation of subsequent negligence or wrong as necessarily increasing the difficulty of avoiding the then impending disaster, for the momentum of a mass in motion increases in proportion to the acceleration of its velocity.

(8) We have no purpose to encroach upon the absolute right of the jury to decide every fairly debatable question of fact, nor do we intend to lay down any rule that would require the jury in any case to accept without reserve the testimony of any witness who may be biased by thought of the consequences to flow from a situation like that in which the engineer in his case found himself. On the other hand, the testimony of witnesses is not to be rejected capriciously, and here uncontradicted facts conspire most convincingly to demonstrate that when appellee's decedent started to cross the track he was already in all human probability doomed as for anything it was then in the power of the engineer to do. Consulting common experience and observation with a careful regard for the facts of this particular case, we feel entirely safe in saying that, moving hurriedly as deceased did, two

[Alabama Great Southern Ry. Co. v. Smith.]

or three seconds took him within the fatal sweep of the train, while three or four might possibly have put him across ahead of the engine by the narrowest of margins. The train was moving rapidly, no doubt, but whatever its speed, the outside limit of time in which the engineer had to act was measured by the time required to take deceased across and to a place of safety on the other side. In these crowded moments the engineer had to get a grasp on the new situation thus suddenly thrust upon him, had to execute the orders of his reason by manipulating the appliances of his machine, and these operations had to take effect upon a train that consisted of a locomotive and five or six coaches. It is perfectly clear upon the whole evidence that deceased, being in a place of safety and aware of the train's approach, tested its speed, and took a chance that must have looked desperate to any man in the normal use of his faculties. It cannot be said that another step might not have saved him, but that is a mere speculation, and there is no reason whatever for doubting that the engineer made an effort to afford deceased an opportunity to escape, and a finding that in the exercise of due care according to the circumstances he failed to do something that he could have done, more or better than he did, and that what he might have done would have been effectual to avert the disaster, is not to be justified on grounds of reason or probability, though theoretically the issue may have been one for jury decision in the first place under our theory of jury trials.

Ordinarily just reasons for the verdict of a jury are not hard to find upon the face of the record of the evidence. In this case, if the verdict had been for the defendant, no one could have doubted that such result was *prima facie* fair and just. But in view of the jury's conclusion to the contrary, it has seemed necessary by a close examination of the record to identify and define those controverted issues of fact upon which a just resolution depended, and then to consider the reasonableness of the result in view of the issues thus identified and defined and the evidence having proper and material bearing upon them. The justification of the result in every case may be thus brought on review to the test of judicial reason, and in this case our judgment is, not only that plaintiff failed to sustain the burden of proof resting upon him in respect of the final and controlling issue in the cause arising out of the charge of subsequent negligence, but that, after according every reasonable presumption in favor of the

[Alabama Great Southern Ry. Co. v. Smith.]

verdict and judgment below, the preponderance of the evidence against the verdict is so great as to leave no substantial doubt that it was wrong and unjust.

It follows also that, if there was no actionable negligence after the engineer discovered that plaintiff's decedent would go upon the track, then, under the law, there could have been no subsequent act of wanton wrong.—*Helms v. Central of Georgia, supra*.

(10-12) There was no error in overruling the demurrer to the two counts of the complaint, charging, respectively, simple negligence and wantonness. Nor was there error in the court's rulings on the numerous special instructions requested by the parties, except in one instance. Charge 12, given on plaintiff's request, was, we think, misleading and positively erroneous. This charge was probably accepted by the jury as indicating an assumption on the part of the court that defendant's train passed the crossing at a great, and therefore reprehensible, rate of speed. But whether so or not, speed is a relative term, and whether a given rate, though great in a sense, is evidential of negligence or wantonness, depends upon circumstances and conditions of which the charge takes no account. The charge is far from merely asserting "the legal proposition that there may be wantonness on the part of a person who shows a reckless disregard for human life, even if at the instant he does not know some one is actually present to be injured by his reckless act," which is the effect attributed to it in the brief for appellee. It purports to state the circumstances out of which wantonness arises, and that the statement is inadequate and erroneous seems quite clear. Although the rate of speed was great and maintained over a "populous" public crossing at grade, the question of wantonness depended upon its reasonableness as measured by conditions to be reasonably anticipated at the time and the adequacy of precautions taken against the danger arising out of those conditions, as by sounding signals of approach. Wantonness does not as matter of law grow out of passing at great speed over a "populous" public crossing at grade, and the further assertion of the charge, that to constitute wantonness the actual presence of the person injured or killed need not be actually known to those operating the train, however correct in itself, had the effect of accentuating its error in omitting specific reference to other evidential considerations from which may be inferred

[Alabama Great Southern Ry. Co. v. Smith.]

wantonness, imputed intention to do wrong, or a universal malice, as it was aptly termed in *Weatherly v. N. C. & St. L. Ry.*, 166 Ala. 575, 51 South. 959. To say simply that a public crossing is "populous" is to inadequately express one of the essential elements of fact about which the law concerns itself in dealing with grade crossing accidents. The fact, without more, that a crossing is within municipal corporate bounds signifies but little. A crossing may be said to be "populous" when it is at customary times used by many people, though at other times or hours it may be deserted. Hence, in defining wantonness at such places, the court has constantly spoken in its decisions of a knowledge of existing circumstances and conditions, or a knowledge that they probably existed at the time, as an element of necessary consideration. No doubt that the considerations to which we have referred were of much importance to defendant in any correct solution of the issue of wantonness or reckless disregard for probable consequences in the manner of approaching the crossing; for unquestionably the weight of the evidence proved signals of approach, and while it showed that the accident occurred in the mid-afternoon of a day in April and at a place described in general terms as a much frequented public crossing, there was in the evidence no intimation of any crowd or confusion of vehicles or pedestrians, nor any that defendant's engineer, who ran the same train over the same crossing at substantially the same rate of speed at the same hour day after day, had any reason to anticipate that any harm would probably result from his operation of the train at the time in question.

For error in giving this charge and in denying the motion for a new trial on the substantial merits of the cause, the judgment must be reversed.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

[Tarrance v. Chapman, et al.]

Tarrance v. Chapman, et al.

Damages for Fire.

(Decided April 6, 1916. 71 South. 707.)

1. **Negligence; Complaint; Sufficiency.**—Where the action was for damages for burning plaintiff's residence, the fire being communicated thereto from defendant's house, and alleged to have originated from a defective chimney, a count alleging damages and destruction by fire of defendant's house and contents, and that defendant's negligence caused such fire to be communicated was not sufficient because it failed to show any duty owed by defendants to plaintiff and a breach thereof; mere proof of damage or destruction of the property by fire will not of itself authorize an inference of negligence, the rule as to locomotives having no application here.

2. **Same; Violating Ordinances or Statutes.**—The violation of a statute or of a valid city ordinance which proximately causes an injury, per se creates a cause of action, and establishes liability.

3. **Same; Complaint; Municipal Ordinance.**—A count in a complaint alleging violation of a city ordinance in regard to the construction of chimneys or flues, which did not allege whether defendant's house was constructed before or after the passage of the ordinance, will be construed as if showing that the house was constructed prior to the passage of the ordinance.

4. **Municipal Corporation; Ordinances; Construction.**—The ordinance considered and stated, and it is held not violated by one whose house had been previously constructed, until such person shall have been notified by the inspector, as provided in the ordinance.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Action by J. D. Tarrance against A. L. Chapman and another, for damages for setting fire to and burning his house. Judgment for defendants, and plaintiff appeals. Affirmed.

Count 1 is as follows: Plaintiff claims of defendant \$5,000 as damages, for that heretofore, to-wit, on or about 25th day of April, 1912, plaintiff owned and was occupying with his family, a residence at 817 Forty-Ninth street, in the city of Birmingham, Ala., and owned a large amount of furniture, goods, and effects in said residence, together with improvements and articles in and upon the curtilages thereof; that on said date said residence and said furniture, goods and effects, and articles were greatly damaged or destroyed by fire, and as a proximate consequence thereof were lost to plaintiff, or rendered of greatly less value to plaintiff, and plaintiff was greatly inconvenienced, vexed,

[Tarrance v. Chapman, et al.]

etc. Plaintiff avers that defendant's negligence caused such fire to be communicated to said residence, and to cause plaintiff's said loss and damage.

Count 6: Plaintiff adopts all of the words of the first count, to and including the claim for injuries and damages caused by said fire, and adds thereto the following: Defendants maintained a flue or chimney on certain premises in said city near to said residence of plaintiff in a manner which was dangerous to plaintiff's said residence, and said flue or chimney was not a part of a wall, nor was it resting on the ground or on iron hangers or plates, and was maintained by defendant in violation of an ordinance of said city of Birmingham, to-wit, section 110, of the City Code of Birmingham, Ala., then in force and effect as follows: "If any chimney, flue, or heating apparatus on any premises shall be constructed or maintained in any manner which is dangerous to said premises, or any house, building or erection situated thereon, or on adjoining premises, or premises near by, the inspector shall at once notify the owner, agent or person in charge or control of said premises, on which the said chimney, flue or heating apparatus is situated. If such person so notified fails for a period of 48 hours after the service of such notice upon him to place such chimney, flue or heating apparatus in safe condition, he shall be liable to a fine as prescribed in this chapter; provided, that any chimney or flue not forming a part of a wall and not resting on the ground or on iron hangers or plates, is hereby declared to be unlawful, and is condemned and adjudged to be dangerous as set out in this section; but this provision cannot be construed to be an exclusive statement of every dangerous condition, and any and all other dangerous conditions shall be subject to this section. Provided, further, that all chimneys, flues, or heating apparatus on premises constructed prior to the 17th day of May, 1905, shall be considered safe if they form part of a wall or rest on the ground, or on iron hangers or plates, and that any person notified as set out above in reference to any such chimney, flue or heating apparatus, shall be deemed to have complied with such notice, if any such chimney, flue or heating apparatus is made to conform with the requirements contained in this proviso; provided, further, that all chimneys, flues and heating apparatuses constructed since the 17th day of May, 1905, shall conform to all the terms and conditions of this chapter." And as a proximate consequence of said

[Tarrance v. Chapman, et al.]

violation of said ordinance by defendant, the building on which said flue or chimney was caught fire and set fire to plaintiff's said residence, and proximately caused plaintiff to suffer the injuries and damages.

Count 2 set out section 29 as to the thickness of the wall of chimneys and the height above the roof, and the size of the flues, section 70, having reference to party walls, and section 71 having reference to smoke flues being lined with cast iron or fire-proof terra cotta pipe from the bottom of the flue to the top of the chimney. Count 7 alleges that defendant negligently maintained a certain flue or chimney on certain premises in said city near said residence of plaintiff in a manner which was dangerous to plaintiff's residence, and that said flue or chimney was not a part of a wall, nor was it resting on the ground or on iron hangers or plates, and was maintained by defendant in violation of an ordinance of the city of Birmingham, to-wit, section 110 of the City Code of Birmingham, then and there in force and effect, which ordinance is set out in count 6, and is here referred to and made a part hereof.

HARSH, BEDDOW & FITTS, for appellant. STOKELY, SCRIVNER & DOMINICK, and F. W. SMITH, for appellee.

GARDNER, J.—Suit by appellant against appellees for the recovery of damages for the burning of plaintiff's residence and the contents thereof, to which residence fire was communicated from the burning of a house owned or maintained by the defendants, near by to plaintiff's said residence, in the city of Birmingham. The fire which burned the defendants' house is alleged to have originated from a defective flue or chimney. The trial court sustained demurrers to some of the counts of the complaint; and on account of these adverse rulings on the pleadings the plaintiff took a nonsuit and prosecuted this appeal.

The argument of appellant's counsel is addressed to the rulings of the court on counts 1, 2, 6, and 7. In *Tennessee Coal, Iron & Railroad Co. v. Smith*, 171 Ala. 251, 55 South. 170, is the following: "All negligence is not actionable, and pleadings, to be sufficient to state a cause of action grounded on negligence, must affirmatively show that the negligence relied upon is actionable. If pleadings as to negligence show a duty owed by the defendant to the plaintiff, and a breach of that duty to the dam-

[Tarrance v. Chapman, et al.]

age or injury of plaintiff, very general averments of negligence will suffice. As is often said, they need be but little more than conclusions; but the duty and its breach must be shown. Merely alleging that a given act was negligence or was negligently done, without more, is not sufficient. * * * Actionable negligence has been defined by this court to be 'the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. * * * In every action grounded solely on negligence there are three essential elements to a right of recovery: First, a duty owing from defendant to plaintiff; second, a breach of that duty; and, third, an injury to plaintiff in consequence of that breach.'

(1) A casual reading of count 1 discloses that it fails to show any duty owing by the defendants to the plaintiff and a breach thereof. It requires no argument to show its insufficiency under the decisions of this court.—*T. C., I. & R. R. Co. v. Smith, supra*. Mere proof of the damage or destruction of the property by fire, in a case of this character, does not, of itself, authorize an inference of negligence.—*Robinson v. Cowan*, 158 Ala. 603, 47 South. 1018. An exception to the general rule as to locomotives, and possibly other agencies of like power and utility (*L. & N. R. R. Co. v. Marbury*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *L. & N. R. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 662), has no application to this case (*Robinson v. Cowan, supra*).

The ruling of the court on counts 2, 6, and 7 involved the question as to the violation of a city ordinance, and is treated by counsel for appellant in their brief as the question of prime importance on this appeal. Count 6 sets out the ordinance and seems to have been prepared with much care. We will therefore discuss this count alone, as we think that our conclusion thereon necessarily controls the result as to counts 2 and 7 also.

It is the insistence of appellant that the violation of a statute or of a valid city ordinance, the proximate cause of the injury, per se creates a cause of action and establishes liability.—*Excelsior Steam Laundry Co. v. Lomax*, 166 Ala. 612, 52 South. 347; *Briggs v. Birmingham R., L. & P. Co.*, 188 Ala. 262, 66 South. 95; *Wolf v. Smith*, 149 Ala. 457, 42 South. 824, 9 L. R. A. (N. S.) 338; 7 Mayf. Dig., p. 634; McQuillin on Munic. Ord. § 41; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47.

[Tarrance v. Chapman, et al.]

(2) It must be conceded in the instant case that plaintiff is shown to come clearly within the class for whose protection, largely, the ordinance in question was enacted; and, the reasonableness and validity of the ordinance being unquestioned, the general rule, as above stated, contended for by counsel for appellant, is here recognized.

(3) It remains, therefore, to ascertain whether or not the count shows that in fact the ordinance set out therein has been violated by the defendants. The count is silent as to whether or not the defendants' house was constructed before or after the passage of this ordinance. Under our rule of construction of pleadings, the count will be considered as if showing that the house was constructed prior to the passage of said ordinance. The provisions of the ordinance as copied in count 6 are as follows: "If any chimney, flue or heating apparatus on any premises shall be constructed or maintained in any manner which is dangerous to said premises, or any house, building or erection situated thereon, or on adjoining premises or premises near by, the inspector shall at once notify the owner, agent or person in charge or control of said premises on which the said chimney, flue or heating apparatus is situated. If such person so notified fails for a period of forty-eight (48) hours after the service of such notice upon him to place such chimney, flue or heating apparatus in safe condition he shall be liable to a fine as prescribed in this chapter; and provided, that any chimney or flue not forming a part of a wall and not resting on the ground, or on iron hangers or plates is hereby declared to be unlawful and is condemned and adjudged to be dangerous as set out in this section; but this provision shall not be construed to be an exclusive statement of every dangerous condition, and any and all other dangerous conditions shall be subject to this section. Provided further, that all chimneys, flues or heating apparatus on premises constructed prior to the 17th day of May, 1905, shall be considered safe if they form a part of a wall or rest on the ground, or on iron hangers or plates, and that any person notified as set out above in reference to any such chimney, flue or heating apparatus shall be deemed to have complied with such notice if any such chimney, flue or heating apparatus is made to conform to the requirements contained in this proviso; provided, further, that all chimney, flues and heating apparatus constructed since

[Tarrance v. Chapman, et al.]

the 17th day of May, 1905, shall conform to all the terms and conditions of this chapter."

(4) We are of the opinion that this ordinance clearly shows that it was not the intention to hold one in violation thereof, whose house had been previously constructed, until after such person had been notified by the inspector as provided therein. A contrary construction would give to the ordinance a retroactive effect, and subject to penalty and liability one who had previously constructed his house in full compliance with all the rules, regulations, and ordinances at that time in force. Such a construction we think not only not justified by the language of the ordinance, but in contradiction thereof.

The construction of the count, therefore, as showing the erection of the house before the passage of the ordinance, taken in connection with the failure on the part of the pleader to allege any notice to the defendants by an inspector, as provided in said ordinance, leads us to the conclusion that the count fails to show a violation of the ordinance. We gather from the brief of counsel for appellant that this is the reason which actuated the court in sustaining these demurrers, and in the court's reasoning and action we fully concur.

What is here said is also sufficient to show that there was no error of which appellant can complain in the action of the court in striking from count 7 that portion thereof which sought to fasten liability on account of the violation of the ordinance set out in count 6.

We have discussed the questions argued by counsel for appellant, and conclude that no reversible error is shown. The judgment of the court below is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

[Louisville & Nashville R. R. Co. v. Lovell.]

Louisville & Nashville R. R. Co. v. Lovell.

Injury by Collision.

(Decided May 18, 1916. 71 South. 995.)

1. **Evidence; Expert; Discretion.**—The examination of a physician testifying as an expert relative to personal injuries alleged to have been received, was necessarily largely within the discretion of the trial court.

2. **Same; Qualification.**—A general knowledge of the department to which the specialty belongs is sufficient to qualify a witness to testify thereto, and the sufficiency of a witness's knowledge of such subject to qualify him to speak as an expert in the matter is addressed to the sound discretion of the trial court.

3. **Railroads; Crossing Accident; Instruction.**—Where there was evidence of conditions which would require the observance of a statute relating to keeping a lookout and giving signals at a crossing, there was no error in charging the jury relevant thereto, or in refusing instruction taking such evidence from the jury's consideration.

APPEAL from Cullman Circuit Court.

Heard before Hon. R. C. BRICKELL.

Action by R. N. Lovell against the Louisville & Nashville Railroad Company for personal injuries, and for injuries to his team, resulting from a collision at a crossing. Judgment for plaintiff and defendant appeals. Affirmed.

(Transferred from Court of Appeals under the act creating said Court.)

GEORGE H. PARKER, and EYSTER & EYSTER, for appellant.
A. A. GRIFFITH, and CALLAHAN & HARRIS, for appellee.

MAYFIELD, J.—This is an action to recover damages for injuries received in consequence of a collision between appellant's accommodation train, and appellee's team and wagon, in which collision two mules of appellee's were killed, and his wagon was demolished, and appellee himself, as he claims, received severe personal injuries; he being in the wagon and driving the team at the time of the collision.

The case was tried on the issues of negligence on the part of the defendant in the operation and management of the trains, in the failure to give the statutory signals, etc., and of contributory

[Louisville & Nashville R. R. Co. v. Lovell.]

negligence on the part of the plaintiff in failing to stop, look, and listen, before attempting to cross the railroad track, and in failing to observe and avoid the danger.

Dr. Hays, a physician, testified as an expert as to the personal injuries alleged to have been received by plaintiff, in the particulars of extent, character, and probable cause.

(1, 2) There was no error in any of the rulings as to such evidence. The examination of such witnesses as to such matters is, of necessity, largely discretionary with the trial court, and we find no abuse of the discretion, nor any denial to the defendant of any of its rights in and to such examinations. A general knowledge of the department to which the specialty belongs is enough to qualify a witness to testify thereto, and if such one, in the opinion of the court, have special acquaintance with the immediate lines of inquiry, he need not be thoroughly acquainted with the differentia of the specific specialty under consideration.

(3) The sufficiency of a witness' efficiency in knowledge of the subject inquired about to qualify him to speak as an expert in the matter is addressed to the discretion of the trial court and its rulings thereon can be disturbed only on its clearly appearing that the court's action was erroneous.—*Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 627, 53 South. 162.

(4) Counsel for appellant are in error in treating the case as if the undisputed evidence showed the track to be straight for such distance, on either side of the point at which the collision occurred, as to take the case out of the influence of the statute which requires those operating locomotives and trains, as in this case, to keep a special looking, and to sound signals of alarm, etc. It is true that the great weight of the evidence tends to show that the track was straight and free from obstructions as to view, etc.; but there was some evidence of conditions which would require the observance of the statute, and therefore there was no error in charging the jury on this subject and phase of the case, as was done, nor in refusing requested charges to the defendant, which took from the jury the consideration of the evidence on this subject.

The evidence was in dispute as to each of the issues tried, and we are not prepared to say that the trial court erred in declining to set aside the verdict and award a new trial.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Smith v. Jeffcoat.]

Smith v. Jeffcoat.**Trespass Quare Clausum Fregit.**

(Decided April 6, 1916. 71 South. 717.)

1. Eminent Domain; Right of Parties; Compensation; Time of Payment.—Where the action was trespass quare clausum fregit, a plea attempting to justify under a probate decree condemning the realty to the use of a railroad for a right of way, and authorizing it to construct its line thereon, and alleging that plaintiff occupied the premises under a lease from the owner entered into after condemnation proceedings were filed, and that the trespass was only so much as was necessary to permit the use of the land for the right of way, is demurrable if compensation had not been paid for the property prior to the entry as is required by § 3882, Code 1907.

2. Same; Computation.—The compensation to be paid by the railroad for the land condemned must be fixed by the valuation of the property as of the date of the petition for condemnation.

3. Same; Effect.—If the railroad compensates the owner for the land taken under eminent domain, its right and title vests under such payment, and relates back to the filing of petition for condemnation, as against intervening rights.

4. Same; Pendente Lite.—One who acquires a leasehold interest in land against which condemnation proceedings have been filed, takes it subject to the rights of the condemning party, and can have no compensation for the alleged interest in the land.

5. Same; Decree; Conclusiveness.—If possession of plaintiff was acquired prior to filing the condemnation proceeding, and plaintiff was not a party, he was not bound by the decree, and was not divested of whatever title he had.

6. Same; Pleading; Sufficiency.—Where plaintiff sought damages for trespass against his leasehold interest by a railroad, and the railroad sought to justify under probate decree in eminent domain, plaintiff's replications thereto were not sufficient because they failed to show the precise character, time of beginning, and duration of his leasehold interest.

7. Same; Entry.—In entering for the reasonable assertion of rights conferred by the statute, and decree of the probate court condemning land in pursuance thereof, a defendant entering as a duly authorized agent of the railroad which condemned the land, was not guilty of a trespass.

8. Trespass; Realty; Personality.—Damages to personal property inflicted by entering the land under a probate decree condemning it for a railroad right of way, does not constitute a trespass against the realty.

APPEAL from Jefferson Circuit Court.

Heard before Hon. C. B. SMITH.

[Smith v. Jeffcoat.]

Action by W. P. Smith against J. B. Jeffcoat for trespass quare clausum fregit. Judgment for defendant and plaintiff appeals. Reversed and remanded.

JOHN W. ALTMAN, for appellant. FORNEY JOHNSTON, and W. R. C. COCKE, for appellee.

SAYRE, J.—(1) This was an action of trespass quare clausum fregit for that defendant entered upon plaintiff's close and moved a storehouse, impairing the storehouse and breaking and destroying articles of personal property therein. Defendant justified under the authority of Birmingham, Ensley & Ressemer Railroad Company and a decree of the probate court condemning the realty to the use of said company for a right of way, authorizing it to construct, maintain, and operate thereon "a double track line of railroad over and upon the said land and through any building within said right of way," alleging that plaintiff occupied the premises under a lease from the owner into which he entered after the proceedings for condemnation had been filed in the probate court, and that on the occasion complained of he did not move the storehouse a greater distance off the right of way than was reasonably necessary in order to construct said railroad. This plea was subject to that ground of demurrer which took the point that compensation had not been made for the property taken prior to the entry complained of, as provided in section 3882 of the Code. This ground of demurrer is now confessed, and for the error in overruling it the cause must be reversed.

(2-4) It is proper, in order to expedite the cause, and we are invited by the parties, to pass upon another question that lays at the root of plaintiff's case. The theory of plaintiff's case was that, regardless of that institution of condemnation proceedings prior to the time of his lease, he acquired a right of possession superior to that of the condemnor, and that he was not concluded by that proceeding because he was not made a party. The compensation to be paid by the railroad company must be fixed by the valuation of the property as of the date of the petition for condemnation.—*Southern Ry. Co. v. Cowan*, 129 Ala. 577, 29 South. 985, and cases there cited. Assuming that defendant will be able to amend his special plea by showing payment or a deposit of the compensation awarded in court for the owner as provided by section 3882 of the Code, prior to the entry alleged, the

[Smith v. Jeffcoat.]

right and title of the railroad company, under whose authority he entered, vested upon such payment or deposit, and, as against intervening rights, related back to the filing of the petition for condemnation. On the facts stated in the plea, plaintiff acquired his leasehold pendente lite, his rights under it were subject to the right of the railroad company petitioning for condemnation, and he was entitled to no compensation as for his alleged interest in the land.—2 Lewis Em. Dom. (2d Ed.) § 338; *Schrieber v. Railroad Co.*, 115 Ill. 340, 3 N. E. 427; *In re State House*, 21 R. I. 59, 41 Atl. 1004. The demurrer to the plea, upon grounds other than that first above noticed, was not well taken.

(5, 6) If by his special replication plaintiff intended only to deny that the right and title by which he held possession at the time of the trespass alleged in the complaint had been acquired after the institution of the condemnation proceedings, every purpose of the replication was served by the general traverse filed at the same time, and there was no reversible error in sustaining the demurrer to the special replication. If the possession against which defendant was alleged to have offended was held by plaintiff under right and title acquired before the condemnation proceedings were instituted, the decree was not conclusive against him, and did not divest him of the lawful right, title, or possession he had, because he was not a party to the proceedings. But the substance of the replication, construed against the pleader, seems to be that at the time of the trespass complained of he was in possession under a lease from the owner, and at the time of the institution of the condemnation proceedings he was the owner of a leasehold interest in the premises under a contract of lease from the owner of the legal title. It is not made to appear that the contract under which plaintiff held at the time of the alleged trespass was the same lease under which he held at the institution of the proceedings for condemnation. Consistently with the facts alleged, the right to the possession upon which defendant entered was acquired by contract intervening between the institution of the proceedings and the alleged trespass. Consistently also, the possessory right under which plaintiff held at the institution of the suit expired before the trespass alleged. If so, defendant's entry was not wrong. The replication was bad, therefore.

(7, 8) In entering for the reasonable assertion of rights conferred by the statute and the decree of the probate court made

[Kearns v. Mobile L. & R. R. Co.]

in pursuance thereof, defendant, as the duly authorized agent of the railroad company, was not guilty of a trespass. Nor did the fact that defendant's removal of the storehouse resulted in the breaking of plaintiff's lamps, scales, and clock, made defendant a trespasser as to the realty. If defendant was guilty of any wrong in respect of plaintiff's personalty, his remedy was by way of a different action.—*Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 South. 874. The gist of plaintiff's action, as framed, was the alleged trespass to realty.—*Hardeman v. Williams*, 169 Ala. 50, 53 South. 794.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Kearns v. Mobile L. & R. R. Co.

Damages for Injury.

(Decided June 1, 1916. 71 South. 997.)

1. **Street Railways; Use of Street; Excavation; Danger Signal.**—The sufficiency of signals or barriers to give reasonable warning of or security against existing danger with respect to their character, number and arrangement is generally a question of fact for the jury.

2. **Same.**—Under the evidence in this case the question whether two rows of red lights placed on each side of the track about eight feet apart, there being an excavation between the rails, constituted a reasonable and sufficient warning to travelers not to pass along the car track between the lights, was a question for the jury.

3. **Same; Pleading; Construction.**—Where the action was for damages for injury to an automobile, and the complaint charged the negligent failure to guard an excavation with proper and sufficient danger signals, a plea alleging by way of conclusion that plaintiff assumed the risk of driving between the lights was necessarily to be regarded as a plea of the general issue.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Action by Robert J. Kearns against the Mobile Light & Railroad Company for damages for injuries to an automobile. Judgment for defendant on the pleadings, and plaintiff appeals. Transferred from Court of Appeals under section 6, p. 449, Acts 1911. Reversed and remanded.

[Kearns v. Mobile L. & R. R. Co.]

The second count of the complaint charges that defendant street railway company was repairing its track or roadbed on Government street in the city of Mobile, and had made large and dangerous holes and excavations therein, of which it became defendant's duty to warn travelers on the street of the nature and location of said excavation; that defendant wholly disregarded and negligently failed in said duty, and negligently failed to guard certain of said excavations with proper and sufficient danger signals, and as the proximate result of said negligence of said defendant an automobile then and there owned by said plaintiff, and being then and there driven over and upon, and then and there lawfully on and upon, the said Government street, while being driven in an easterly direction over and along said Government street in the nighttime, and without any fault on the part of the plaintiff, his said automobile was driven into the said holes and excavations, etc., to the damage of said automobile, etc.

The third plea of defendant was as follows: Defendant says that the excavation complained of was between the rails of one of defendant's tracks and within 20 inches on each side thereof, and that defendant had caused red lights to be set out in a row on each side of said excavation, one light at each end of the excavation and one light about the middle, which said two rows of lights were not more than eight feet apart, and which said two rows of lights plaintiff observed, and nevertheless undertook to drive his automobile between the said rows of red lights and thereby voluntarily assumed the risk of so doing.

To this plea plaintiff replied specially as follows: That the excavation by said plaintiff complained of was between the rails of defendant's track, and within 20 inches on each side thereof, and defendant did have three red lights stationed in a row on each side of said excavation, one at each end thereof, and one about the middle, which two said rows of red lights were eight feet apart. And plaintiff avers that defendant did have, and in addition to two said rows of red lights did station, have, and maintain, numerous other red lights on the south side of said excavation, and on the south side of Government street opposite the said excavation, and extending to the south curb of said Government street, so that by reason of the stationing and maintenance of the said lights as aforesaid it was made to appear that the whole of the south side of the said Government street oppo-

[Kearns v. Mobile L. & R. R. Co.]

site the said excavation was closed to traffic, and to vehicles being run and operated over and along the said street, and that the space of eight feet between the said two rows of red lights was unobstructed and safe for traffic and travel; that the plaintiff, in view of the said lights being stationed and maintained as aforesaid, did reasonably believe that the said space and opening between the two rows of lights eight feet apart was unobstructed and safe for traffic and travel, and did while exercising reasonable care and caution drive, or cause to be driven, his automobile between the said two rows of lights eight feet apart, as a result whereof the said plaintiff's automobile did drop and fall into the excavation made and maintained by the said defendant between the said two rows of red lights, and otherwise unguarded by the said defendant, causing thereby proximately the damage to the plaintiff's said automobile in his complaint complained of. And this the said plaintiff is ready to verify.

The court overruled plaintiff's demurrer to plea 3, and sustained defendant's demurrer to replication, and plaintiff took nonsuit, with bill of exceptions.

STEVENS, MCCORVEY & MCLEOD, and D. B. GOODE, for appellant. HARRY T. SMITH & CAFFEY, for appellee.

SOMERVILLE, J.—The question of decisive importance in this case, as presented by the demurrer to defendant's third plea, is whether the nine red lights stationed as warning signals—three on each side of defendant's street railway track with an open space of eight feet occupied by the track between them—were, as a matter of law, a sufficient warning to travelers in vehicles, who saw the lights, that the street way within the two rows of lights was in a condition dangerous or impassable for vehicles.

(1) It must of course be conceded that, as a general rule, the sufficiency of signals or barriers to give reasonable warning of or security against existing danger, especially with respect to their character, number, and arrangement, is a question of fact for the jury. Counsel for appellant have collected a number of cases so holding: *Mayor, etc., of Baltimore v. Maryland*, 166 Fed. 641, 92 C. C. A. 335; *Meck v. Nebraska Tel. Co.*, 96 Neb. 539, 148 N. W. 325; *McMahon v. City of Boston*, 190 Mass. 388, 76 N. E. 957; *Grider v. Jefferson Realty Co. (Ky.)* 116 S. W. 691; *Stockton Auto Co. v. Confer*, 154 Cal. 402, 97 Pac. 881; *Sutton v.*

[Kearns v. Mobile L. & R. R. Co.]

City of Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Donnelly v. City of Rochester*, 166 N. Y. 315, 59 N. E. 989. See also, *Fox v. Wharton*, 64 N. J. Law, 453, 45 Atl. 793.

(2) We were at first of the opinion that, as a matter of simple, practical common-sense, the two rows of red lights, as shown by the plea, constituted a reasonable and sufficient warning to travelers, regardless of all other circumstances, not to pass along the car track between the lights; but, upon further consideration, we are of the opinion that the conclusion cannot be safely reached by the court, and that the question should be determined by the jury in the light of all the facts. It may be that the street lights made visible to plaintiff the excavations outside of the rails, but not those inside; and it is conceivable that two such rows of lights might be placed to guard outside excavations alone, with nevertheless a safe and unbroken passageway within. It does not appear how far the excavations extended along the track, nor how far apart the lights were in the rows—a circumstance which might favor conflicting inferences as to the significance of the lights as they appeared to plaintiff. It may well be that a jury would have no difficulty in finding that lights were, under all the circumstances, a sufficient warning against the attempted passage, or that plaintiff was in any case guilty of contributory negligence. But we think the jury ought to pass on these questions. We hold, therefore, that the plea was subject to the demurrer, which should have been sustained.

(3) Although the plea alleges, by way of conclusion, that plaintiff "assumed the risk" of driving between the lights, the plea is necessarily to be regarded simply as a plea of the general issue, since it is in traverse of the complaint, which charges a negligent failure to guard the excavations with "proper and sufficient danger signals." If the signals were *sufficient*, plaintiff's case fails. If they were *not* sufficient, plaintiff did not, *merely because he saw them*, assume the risk of a danger which they did not fairly forecast.

The other special pleas were not subject to the demurrers assigned. For the error in overruling the demurrer to plea 3, the judgment will be reversed, and one here rendered sustaining the demurrer, and the cause will be remanded.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

[Poe v. Southern Railway Co.]

Poe v. Southern Railway Co.

Setting Out Fire.

(Decided May 18, 1916. 71 South. 997.)

1. **Railroads; Setting Out Fire; Prima Facie Case.**—The mere fact that fire was communicated to plaintiff's property from a burning railroad car or a building on the railroad right of way does not make out a prima facie case of negligence as in cases of fire set out by sparks from passing locomotives.

2. **Same; Burden of Proof.**—Where there was evidence tending to show that plaintiff's building was ignited by fire from a locomotive the burden passes to the railroad company to show at least prima facie that the fire was emitted without negligence in the engine's construction, equipment and operation.

3. **Same.**—Where fire is communicated from a railroad's right of way, in consequence of a burning building on the right of way, or a burning car merely standing on the track, the same rules of evidence prevails as to the burden of proof, as in other cases of fire communicated from one building to another, or one premises to another, in the absence of a statute.

4. **Negligence; Fire; Liability of Owner.**—Where an owner of property sets out fire on his own premises for a lawful purpose, and in a proper and careful manner, and without negligence, or the fire accidentally starts without his fault, he is not liable for damages caused by its being communicated to the property or premises of another, unless he is thereafter guilty of negligence in failing to control or extinguish such fire before it spreads.

APPEAL from Fayette Circuit Court.

Heard before Hon. BERNARD HARWOOD.

George W. Poe, Jr., sued the Southern Railway Company, for damages for the destruction of property by fire. Judgment for defendant and plaintiff appeals. Affirmed.

GUNN & POWELL, for appellant. BANKHEAD & BANKHEAD, for appellee.

MAYFIELD, J.—The action is to recover damages for the destruction of a lot of lumber by fire. The lumber was placed on the defendant's right of way for shipment. Fire was communicated to it from a camp or commissary car used by the section hands of the defendant, stationed on a side track near plaintiff's lumber. The origin of the fire in the car, whether accident, negligence, or intentional act, is not shown. The fire was discov-

[Poe v. Southern Railway Co.]

ered about 10 o'clock at night, by the smoke's awakening those sleeping in or near the car. There were on the same switch track some bunk cars, and the commissary car which burned. The other cars were removed or pushed away, and were not burned. The burning car was so far consumed and so hot when the fire was discovered that it could be moved, or was moved, only a short distance. All the witnesses who were present testified that the car was not moved at all after the fire was discovered.

One of the main contentions of the plaintiff, appellant here, is that there were circumstances and conflicts in the evidence tending to show that the car was moved after the fire was discovered and left nearer plaintiff's lumber; and this is by appellant claimed to be the basis of the negligence and the proximate cause of the burning of his lumber. These circumstances were that the burned car was seen the evening before the fire, when it was several feet further from the lumber, than was the heap of ashes, iron, etc., which next morning indicated the point where it was consumed. The contradiction consists of evidence tending to show contradictory statements by some of the witnesses who testified that the car was not moved after the fire was discovered. Appellant claims that this made a question for the jury to say whether, if it had not been moved, it would probably not have ignited the lumber.

The trial court, after all the evidence was in, gave the affirmative charge for the defendant, and this is the only error insisted upon to reverse the judgment.

We are not of the opinion that the circumstances and apparent conflict above pointed out showed or tended to show any negligence in the moving of this car, or in the failure to move it after the fire was discovered. If it be conceded that the car was moved several feet between the time plaintiff and his witness saw it on the evening before and the time it was burned, there is nothing in this to show any actionable negligence or willful motive to jeopardize or burn the lumber. It may have been moved with the greatest possible care, whether moved before or after the fire was discovered; and the evidence introduced to show contradictory statements, if true, did not show or tend to show any actionable negligence, but rather tended to show the contrary; that is, that it was impossible to move it away from the point where it burned. We do not think that the facts shown, most of which are undisputed, make a case of *res ipsa loquitur*, to show

[Poe v. Southern Railway Co.]

actionable negligence on the part of the defendant. The undisputed facts no more show actionable negligence than they do unavoidable accident.

(1, 2) It is true that we have a line of cases somewhat like this—that is, cases against railroads for the destruction of property by fire communicated by agencies of the railroad—wherein the burden of proof is on the railroad company to go forward with evidence to rebut certain presumptions of negligence. These were cases, however, in which the fire was communicated by sparks from engines, locomotives, etc., but the rule of which has never been extended to cases like the one under consideration. In cases like this the mere fact that the fire was communicated to plaintiff's property from a burning car or building on the defendant's right of way does not make out a *prima facie* case of negligence as in cases of sparks from passing engines or locomotives. These rules and distinctions have been announced and made by this court in the following cases. *Sullivan T. Co. v. L. & N. R. R. Co.*, 163 Ala. 126, 50 South. 941, and *Ala. G. S. R. R. Co. v. Demoville*, 167 Ala. 292, 52 South. 406. Where the action is against a railroad company for setting out a fire, and there is evidence tending to show that plaintiff's building was ignited by fire from defendant's locomotive, the burden passes to the defendant to show at least *prima facie* that the fire was emitted without negligence in the construction, equipment, and operation of the locomotive.—*Sullivan T. Co. v. L. & N. R. R. Co.*, *supra*; 7 Mayf. Dig. 779.

The burden of proof and the presumption of negligence are somewhat different in cases in which property is fired directly by sparks emitted from engines from cases in which the fire spread from other property on fire upon the right of way of the company. Mr. Elliott (Railroads, § 1242) says that, where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way, the authorities are pretty well agreed and settled. In such cases it is but just that the burden should rest upon the plaintiff; for the means of proof are as equally available to the plaintiff as to the defendant.—*A. G. S. R. R. Co. v. Demoville*, *supra*; 7 Mayf. Dig., *supra*.

The *Demoville Case* is nearer in point than any of our cases. There the distinction between cases of fire communicated by sparks from engines and cases like this was recognized; but in that case there was evidence which tended to show negligence in

[Poe v. Southern Railway Co.]

the loading of cotton into the car, and that the cotton was either put into the car when on fire, or was negligently fired while being loaded by the railroad's agents. There is no such proof in this case, but, on the contrary, the whole tendency of the evidence is to show that the origin of the fire was an accident pure and simple; that it was not the result of any negligence or wrongful act on the part of the defendant or of its agents.

The case nearest in point which we have found is that of *So. Ry. Co. v. Power Fuel Co.*, 152 Fed. 917, 82 C. C. A. 65, 12 L. R. A. (N. S.) 472. The facts in that case were very similar to the fact in this case, with this difference: There there was some evidence to show negligence in the originating of the fire in the camp car, in that a drunken man was handling a lamp which ignited the car. The case was also governed by the laws of South Carolina, which state has a statute placing the burden of proof on railroad companies in all cases where fire is communicated from the railroad's right of way, whether sparks from passing engines, or from other cause. In that case it was held that no liability was shown; but it was also held by a majority of the judges that the only acts of negligence shown or attempted to be shown were acts of persons not the agents of the defendant, or, if they were such, then they were done by such agents while not acting within the line or scope of their authority. In that case, however, the judgment of the trial court was reversed for its refusal to direct a verdict in favor of the defendant, notwithstanding the statute above referred to.

(3, 4) Where fire is communicated from a railroad right of way, in consequence of a burning building, or of a burning car merely standing on the track, as in the case at bar, in the absence of a statute, the same rules of evidence as to the burden of proof seems to prevail as in other cases of fire communicated from one building to another, or from one premises to another. This rule seems to be now settled in the United States to the effect that, where an owner of property sets out fire upon his own premises for a lawful purpose and in a proper and careful manner, and without negligence, or the fire accidentally starts thereon without his fault he is not liable for damages caused by the fire's being communicated to the property or premises of another, unless he was thereafter guilty of negligence or actionable wrong in failing to control or extinguish it before it spread from his premises.—*McNally v. Colwell*, 91 Mich. 527, 52

[Birmingham Southern Ry. Co. v. Stephens.]

N. W. 70, 30 Am. St. Rep. 501. In a note to this case the authorities are collected, and it is there said in conclusion: "The destruction of property by fire, either upon the premises where it starts or is kindled or on other property to which it is communicated, does not raise a presumption of negligence either in the kindling or management of the fire.—*Catron v. Nichols*, 81 Mo. 80, 51 Am. Rep. 222; *Lansing v. Stone*, 37 Barb. [N. Y.] 15; *Bryan v. Fowler*, 70 N. C. 596. In all such cases the burden of proof is upon the plaintiff to show that the damage was caused by the negligence of the party kindling the fire.—*Sturgis v. Robbins*, 62 Me. 289; *Bachelder v. Heagan*, 18 Me. 32; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400; *Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 460; *Read v. Pennsylvania R. R. Co.*, 44 N. J. Law, 280; *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584. Whether there was negligence is a question of fact for the jury to determine.—*Powers v. Craig*, 22 Neb. 621 [35 N. W. 888]; *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *Jordan v. Lassiter*, 51 N. C. 130; *Dewey v. Leonard*, 14 Minn. 153 [Gil. 120]; *De France v. Spencer*, 2 G. Greene [Iowa] 462, 52 Am. Dec. 533."

This is, of course, subject to exception where the fire was communicated by sparks from engines, locomotives, etc., as we have above shown. The reason of this distinction we need not now discuss.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Birmingham Southern Ry. Co. v. Stephens.

Injury to Servant.

(Decided June 1, 1916. 72 South. 35.)

Pleading; Demurrer; Specifying Ground.—Where the complaint alleged that defendant was operating a railroad, and that plaintiff while in the service of defendant as a bridge repairer, and engaged in his duties, received injuries from the negligence of defendant's employee, acting as superintendent, in permitting defendant's motor car of which he was in charge, to be wrecked, was sufficient as against the demurrer which did not specifically raise the point that it was essential to aver that plaintiff was an employee in and about the railroad, or that his duties required him to be working in and about the railroad. (Subdiv. 5, § 3910, Code 1907.)

[Birmingham Southern Ry. Co. v. Stephens.]

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Action by L. S. Stephens against the Birmingham Southern Railroad Company, for damages for injury. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under section 6, Acts of April 18, 1911, p. 449. Affirmed.

As amended, the complaint is as follows: Count 1. Plaintiff claims of defendant * * * damages for that heretofore, to-wit, * * * defendant was engaged in the operation of a railroad in Jefferson county, Ala., and running thereon its engines and cars, propelled by steam for the transportation of freight for hire; and, on said date, plaintiff was in the service or employment of said defendant in the capacity of a bridge repairer or carpenter, and while in such service or employment, engaged in the discharge of his duties as such employee, plaintiff suffered the following injuries, to-wit [here follows catalogue with the allegation that plaintiff was permanently injured].

Plaintiff avers that his said wounds and injuries were the proximate consequence, and caused by reason of the negligence of some person, to-wit, Mr. Sam Nichols, who was in the service or employment of defendant, and who had charge or control of the car upon a railway or a part thereof, which was being used in connection with the business of said defendant, and said negligence consisted in this, viz.: Said Nichols negligently ran said car over a derailing switch. Count 2 is the same as 1 down to and including catalogue of injuries, and adds: Plaintiff avers that his said wounds and injuries were the proximate consequence, and caused by reason of the negligence of a certain person, viz., Mr. Sam Nichols, who was in the service or employment of said defendant, and who had superintendence intrusted to him while in the exercise of such superintendence, and the said negligence of said superintendent consisted in this, viz.: Said superintendent negligently allowed or permitted defendant's railway motor car to be wrecked upon a railway.

PERCY, BENNERS & BURR, for appellant. ERLE PETTUS, for appellee.

ANDERSON, C. J.—Counts 1 and 2, as amended, not only conform to the ones held good in the case of *A. G. S. R. Co. v.*

[Birmingham Southern Ry. Co. v. Stephens.]

Davis, 119 Ala. 572, 24 South. 862, but meet the point of criticism of said case in *Woodward I. Co. v. Marbut*, 183 Ala. 310, 62 South. 804. It may be conceded that the counts do not meet the requirements set forth in the case of *Ala. S. & W. Co. v. Griffin*, 149 Ala. 423, 42 South. 1032, but this case was modified in the case of *Boggs v. Consolidated I. Co.*, 167 Ala. 251 52 South. 878, 140 Am. St. Rep. 28, and we think that the counts in question meet the requirements of said last case. Moreover, if these counts proceed under subdivision 5 of the Employer's Act, and it was essential, in an action under the statute, as distinguished from the common law, to aver that the plaintiff was an employee in and about the railroad, or that his duties required him to be working upon or about a railroad, this point is not specifically pointed out by the defendant's demurrer.

Counts 1 and 2, as amended, in the case at bar, are unlike the count condemned in the case of *Gordon v. Tenn. Co.*, 164 Ala. 203, 51 South. 316. They aver that the defendant was engaged in operating a railroad and in running an engine and cars, etc., and that the plaintiff's injuries were the proximate consequence, and caused by the reason of the negligence of Sam Nichols, who was in charge and control of a car upon the defendant's railway, etc. The second count, charging that the defendant's servant negligently permitted the defendant's railway motor car to be wrecked, etc. The complaint in the *Gordon Case* did not charge that the track or cars belonged to the defendant, or that the cars were being operated by the defendant's servants. The report of this case shows an amendment to the complaint, but the opinion of the court dealt with the complaint before the amendment. The original record has been examined, and the error assigned and treated in the opinion in the *Gordon Case*, *supra*, was to the original complaint, and not after the amendment as set out by the reporter. Indeed, the trial court held the count as amended sufficient, and overruled the defendant's demurrer to the amended count, and this court did not consider the count as amended.

The judgment of the city court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

[Brookside-Pratt Mining Co. v. McAllister, et al.]

Brookside-Pratt Mining Co. v. McAllister, et al.

Damages for Overflow.

(Decided June 1, 1916. 72 South. 18.)

1. **Property; Title; Possession.**—Possession of land is *prima facie* evidence of title, however recent, and will support an action for injury to the freehold, or for possession, as against one who does not show a better title.

2. **Parties; Plaintiff; Joinder.**—Where the action is joint for injuries from overflow, plaintiffs cannot recover damages purely personal to each, such as physical or mental pain, anguish or inconvenience of either plaintiff alone, although both suffered like damages.

3. **Appeal and Error; Review; Presentation Below.**—Whether the matters appear in the pleading or not, advantage may be taken of improper joinder of parties in an action for injuries to their respective persons, on appeal.

4. **Same; Harmless Error; Pleading.**—As a defendant may protect himself against injurious results of improper claims for damages by objections to evidence by special charges, and in other ways, error will not be predicated on rulings on motion to exclude such claims.

5. **Waters and Watercourses; Overflow; Damages.**—Where the action was by the husband and wife for injuries consequent upon an overflow a refusal of a charge that plaintiff cannot recover for mental anxiety by reason of the illness of their children was erroneous.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROW.

Action by John McAlister and wife against the Brookside-Pratt Mining Company, for damages for overflow, etc. From a judgment for plaintiffs, defendant appeals. Transferred from Court of Appeals under Act April 18, 1911 (Laws 1911, p. 450) § 6. Reversed and remanded.

Charge 8 refused to defendant is as follows: I charge you that you cannot award plaintiff any damages for mental anxiety caused by the illness of their children.

TILLMAN, BRADLEY & MORROW, T. A. MCFARLAND, and E. CRAMTON HARRIS, for appellant. J. W. ALTMAN, for appellee.

MAYFIELD, J.—This is a joint action by husband and wife to recover damages. The alleged wrong was the flooding of plaintiffs' premises with water drained from defendant's mine. The damages sought to be recovered were injuries to the prem-

[Brookside-Pratt Mining Co. v. McAllister, et al.]

ises and home, in the way of filling the well with foul water, and causing the foul water to run and to stand on the premises and under the house, rotting the house, and rendering the home less comfortable and less valuable by reason of mud, slush, etc. To these damages, as for injuries to plaintiffs' home and premises, are added damages as for personal injuries—that is, physical and mental pain and anguish, and inconvenience, etc., on account of the illness of plaintiffs' children and (in one count) of the husband, as a proximate result of the wrong alleged.

It is insisted that plaintiffs were not entitled to recover damages as for injuries to the home, because no joint ownership of the home was proven. There was evidence of possession and control of the premises and home by the plaintiff, sufficient, in connection with the other evidence, to carry the question of ownership to the jury, and therefore to prove that part of the complaint as alleged. There was also sufficient evidence to carry to the jury the question of injuries to the premises as alleged, and hence the defendant was not entitled to the requested charges, which would deny a recovery of any damages as to the premises or any part thereof, the well, house, etc.

(1) Possession of land, however recent, is *prima facie* evidence of title, and will support an action for an injury to the freehold, or for the recovery of possession, against one who does not show a better right.—*McCall v. Doe*, 17 Ala. 533; *Eakin v. Brewer*, 60 Atl. 579; *Mfg. Co. v. Gibson*, 62 Ala. 369; *Higdon v. Kennemer*, 120 Ala. 193, 24 South. 439; 4 Mayf. Dig. 512.

“It is a maxim of the law that the party in possession of lands is presumed to have a valid title thereto, and this presumption can be overcome only by proving title out of such party. Indeed, it has been said that possession of real estate is *prima facie* evidence of the highest estate in the property; that is, a *seisin in fee*.”—*Id.*

(2) The action being joint, the plaintiffs were not entitled to recover damages which were purely personal to each and not joint as to both, such as physical or mental pain, anguish or inconvenience of either the husband or the wife alone. Even if both suffered like damages in this respect, such are necessarily separate and individual, and go to each separately, and not to both jointly. Such separate and individual damages are not recoverable in a joint action like this.—*Jefferson Fert. Co. v. Rich, et al.*, 182 Ala. 633, 62 South. 40.

[Brookside-Pratt Mining Co. v. McAllister, et al.]

Mr. Dicey, in his book on Parties, states the law and the rules of practice correctly and succinctly as follows: "1. Persons who have a separate interest and sustain separate damages must sue separately.

"2. Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof.

"3. Persons who have a joint interest must sue jointly for an injury to it."—Dicey on Parties to Action (2d Ed.) 401.

(3) Several parties cannot sue jointly for injuries to their respective persons. The principle underlying the rule is that it is not the act which injures one or both, but the consequence of the act, in the way of damages, that determines whether plaintiffs should joint or sever. One stroke or one word may injure two or more alike, in the person or in the feelings, yet their actions are separate and not joint. There can be no joint action in such cases because one cannot share the suffering or injury of the other.—1 Chit. p. 64. If there be an improper joinder in such cases, advantage may be taken thereof by appeal or writ of error, whether the matter appear in the pleading or not. It has been repeatedly ruled in this court that if a count claims, in part only, damages not recoverable, this is not ground of demurrer, but of motion to strike, objection to evidence to support, and special instructions that such damages wrongfully claimed are not recoverable.

(4) The rule is not to predicate error on rulings on motions to exclude for the reason that the defendant may protect himself against injurious results, in case of error, by objections to the evidence, by exceptions to the court's oral charge authorizing recovery, and by special charges.—*W. F. Vandiver & Co. v. Waller*, 143 Ala. 411, 39 South. 136; *Southern R. Co. v. Coleman*, 153 Ala. 266, 44 South. 837; *Bixby Co. v. Evans*, 174 Ala. 576, 57 South. 39; 7 Mayf. Dig. 224.

(5) It was also reversible error to refuse defendant's requested charge 8; the damages specified in this charge were not recoverable in this action. Plaintiffs were not entitled to recover any damages as for mental suffering because of the sickness of their children, and this was only the effect of the charge.—*Birmingham Waterworks Co. v. Martini*, 2 Ala. App. 652, 56 South. 830, 833, 834; *Bube's Case*, 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; 29 Cyc. 1271; *Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; *Jefferson Fert. Co. v. Rich, et al., supra*.

[Ray v. Brannan.]

The instructions seeking to prevent a recovery as for damages to the well, garden, house, etc., and to limit such damages to nominal only, were properly refused. There was evidence sufficient to carry this case to the jury on these questions.

There was no error in overruling the demurrer to the complaint.

Reversed and remanded.

ANDERSON, C. J., and GARDNER and THOMAS, JJ., concur.

Ray v. Brannan.

Automobile Accident.

(Decided May 18, 1916. 72 South. 16.)

1. **Motor Vehicles; Ordinances; Right of Way.**—A city ordinance providing that vehicles going in certain directions should have the right of way over vehicles going in other directions, does not mean that a vehicle not having the right of way at a crossing must at its peril avoid collision with a vehicle having a right of way, irrespective of care or negligence by either party.

2. **Negligence; Contributory.**—The right of one to expect the observance of specific legal duties by others does not excuse him from observing the specific duties imposed by law on himself, and if he fails to do so, and is proximately injured thereby, he cannot recover.

3. **Same; Jury Question.**—Where plaintiff had violated no specific legal duty so as to become guilty of negligence per se, the extent to which he may rely upon defendant's observance either of specific duty or general due care to avoid the injury is a question for the jury.

4. **Motor Vehicles; Collision; Jury Question.**—In this case, under the evidence whether plaintiff exercised due care as to rate of speed at a street intersection, was a question for the jury.

5. **Charge of Court; Ignoring Issues.**—Although abstractly correct, a charge which ignores issues raised by the evidence is properly refused.

6. **Appeal and Error; Harmless Error; Evidence.**—Where the action was for damages caused by an automobile collision at a street crossing, and defendant had the right of way by ordinance, it was highly prejudicial to exclude a statement by the plaintiff that he could not see or estimate the position of defendant's car on the intersecting street when he first saw defendant, it appearing that plaintiff saw defendant's car 10 or 15 feet before plaintiff reached the intersecting street; such statement being highly relevant to the question of plaintiff's due care in the effort to avoid the collision.

7. **Evidence; Opinion.**—Where the question was whether in witness's opinion plaintiff's car ran into defendant or vice versa, it was properly excluded as being the mere opinion of the witness.

[Ray v. Brannan.]

APPEAL from Mobile Law and Equity Court.

Heard before HON. SAFFOLD BERNEY.

Action by Paul B. Ray against Thomas Brannan for damages for personal injuries suffered in an automobile accident. Judgment for defendant, and plaintiff appeals. Transferred from Court of Appeals, under section 6, p. 449, Acts 1911. Reversed and remanded.

The complaint charges: First that the servant of defendant so negligently drove defendant's car as to collide with plaintiff's car at the intersection of Warren and Government streets in the city of Mobile; and, second, that said collision was due to the failure of said servant to keep reasonably near the right hand curb of Government street as required by city ordinances. The general issue was interposed, and several pleas of contributory negligence, setting up substantially that plaintiff negligently approached the street intersection at such a high rate of speed that after he saw, or should have seen, defendant's approaching car, he was unable to stop his own car; and in connection with the same allegation that a city ordinance further provides that police, fire departments, patrol, ambulance, and United States mail vehicles shall have the right of way through any street and any procession, and that, subject to the foregoing exceptions, and everything being equal, all vehicles going in an easterly and westerly direction shall have the right of way over all vehicles going in a northerly and southerly direction, and that plaintiff's car was not one of the excepted vehicles, and that plaintiff negligently attempted to cross said street intersection in his car at a speed greater than 15 miles an hour, in violation of the city ordinance forbidding such excessive speed; and that plaintiff negligently attempted to turn westward around such corner of Government and Warren streets at a speed greater than 10 miles an hour, in violation of the city ordinance prohibiting such excessive speed. The pleading and the evidence shows that Warren street runs north and south, and Government street runs east and west, and that plaintiff was driving along Warren and defendant along Government street. The evidence is in conflict as to the speed of the colliding cars, and as to their relative position with respect to the right-hand street curbing, and to each other, both before and at the time of the collision. There were tendencies of the evidence from which the jury might have found that plaintiff's car was traveling northward near the right-hand

[Ray v. Brannan.]

curb at 7 or 8 miles an hour, and that defendant's car was proceeding westward south of the center line of the street at a speed up to 18 miles an hour.

The chief question presented by the assignments of error is upon the following charge given to the jury at the request of defendant: "Under the ordinances of the city of Mobile, Mr. Brannan's car had the right of way on Government street over Mr. Ray's car, and it was the duty of Mr. Ray, when approaching Government street over Warren street, to have his car under such control as to be able to avoid a collision with vehicles using Government street in an east and west direction, and if you are reasonably satisfied from the evidence that Mr. Ray did not so approach Government street, and that the accident complained of proximately resulted from his failure to do so, then your verdict should be for defendant."

STEVENS, MCCORVEY & MCLEOD, for appellant. BESTOR & YOUNG, for appellee.

SOMERVILLE, J.—(1) The written charge given to the jury at the defendant's request was, in effect, an affirmative instruction to find for the defendant. The proposition of law it declares is that, since vehicles traveling on Government street have the "right of way" at the crossing over vehicles traveling on Warren street, a vehicle on Warren street must at its peril avoid collision with a vehicle on Government street, no matter how carefully and lawfully the former, and no matter how recklessly and unlawfully the latter, may be traveling.

This is not sound law, and the "right of way" ordinance cannot be reasonably construed as declaratory of such a result. It very clearly means that when a vehicle on each of these streets approaches their intersection, visible to each other, at such a time and such a speed as would render their collision imminent if one should not give way to the other, then the vehicle going north or south must, at its peril, be so conducted, circumstances permitting, as to allow the vehicle going east or west to safely pass in front. The conditions of traffic on intersecting streets may reasonably require that such priority be given to one street over another.

But the mere fact that one vehicle has the "right of way" over others crossing its path does not release the vehicle thus

[Ray v. Brannan.]

favoured from the duty of exercising due care not to injure the others at the place of crossing. On the contrary, the duty of due care to avoid collisions remains reciprocal, and the driver of each vehicle may, within reasonable limits, rely upon the discharge of his duty by the other—including, among other things, the reasonable observance of those municipal regulations with respect to speed and position, which are designed not only to facilitate traffic and travel, but also to make it safe for the public as far as is humanly possible.—*Weatherly v. N. C. & St. L. Ry.*, 166 Ala. 575, 584, 51 South. 959; 33 Cyc. 924; *A. G. S. R. R. Co. v. McDaniel*, 192 Ala. 639, 69 South. 60.

(2) But this right to expect the observance of specific legal duties by others does not excuse any one from observing the specific duties imposed by law upon himself; and his failure to do so, if the proximate cause of his injury, would as a matter of law defeat his right of recovery.—*L. & N. R. R. Co. v. Mothershed*, 97 Ala. 261, 268, 12 South. 714; *A. G. S. R. R. Co. v. Roach*, 110 Ala. 266, 20 South. 132.

(3) When, however, the plaintiff has violated no specific legal duty so as to become guilty of negligence per se, the extent to which he may rely upon the defendant's observance either of specific duty, or general due care to avoid injuring him, is a question for the jury under the circumstances of each case.

(4) So, in this case, if the plaintiff was observing the specific duties enjoined upon him by the traffic ordinances, he was not bound to approach the crossing at a lower rate of speed than would be reasonably necessary to secure to the defendant a safe right of way, assuming that the defendant was also observing the same duties as to speed and position, as prescribed by law. What speed would reasonably conserve this purpose would depend upon the width of the streets, the number of vehicles using the crossing, the scope of the drivers' view, and the facility with which cars can be halted or controlled. The plaintiff's duty was one of due care under the circumstances, and the question was necessarily one of fact for the jury.

It is quite clear that the charge under consideration was both erroneous and prejudicial, and its giving to the jury must work a reversal of the judgment.

We do not think that the qualifying clause, "everything being equal," in the right of way ordinance, has any bearing on the present case. It doubtless has reference to the preferred classes

[Ray v. Brannan.]

of vehicles enumerated in the first part of the section, but very clearly not to any equality in the observance of traffic regulations by the crossing vehicles.

(5) Charge 4 refused to plaintiff is abstractly correct, but would have been misleading as applied to the issues of the instant case, since it ignored the qualifying effect of contributory negligence by plaintiff.

Charge 7 refused to plaintiff ignored the question of defendant's right of way over plaintiff, and plaintiff's obligations with respect thereto; and omitted, also, the predicate that the collision was the proximate result of defendant's violation of the ordinance.

Each of these charges was therefore properly refused.

(6) We think it was clearly competent for plaintiff, who it appears saw defendant's car 10 or 15 feet before he (plaintiff) reached Government street, to state that he could not see or estimate its position on Government street when he first saw it coming. This was highly relevant to the question of plaintiff's due care in the effort to avoid the collision. In excluding the question designed to elicit this fact, there was prejudicial error to plaintiff.

(7) On the other hand, whether plaintiff's car ran into defendant's, or vice versa, would have been, under the facts shown, a mere opinion of the witness, and the question was properly excluded.

For the errors noted, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

[Franklin v. Southern Railway Co.]

Franklin v. Southern Railway Co.

Injury to Passenger.

(Decided May 11, 1916. 72 South. 11.)

1. **Carriers; Passengers; Invitation to Alight.**—Where a railroad passenger's destination is called as of the next stop, and the train soon afterwards comes to a full stop, though it was at a switch and not at the station, there was an implied invitation for the passenger to alight, and the railroad was liable for its negligent failure to provide her with a safe place to do so.

2. **Same; Duty.**—The law imposes upon all carriers the duty to exercise the highest degree of care, skill and diligence in the transportation of passengers.

3. **Same; Instructions.**—Where the action was for injuries to a passenger while alighting, and there was evidence that plaintiff was not aware that the train was not at the regular station, and having her baby in her arms, could not see just where it was, and that the flagman had his face towards her, and her suitcase in his hand, having helped her other child off the train, a charge asserting that the flagman was not charged with any duty of notifying plaintiff not to get off, unless he knew that she was going to do so, and knew that plaintiff did not know that she was not at the station, was erroneously given.

4. **Same; Duty of Flagman.**—Where the train had stopped at a switch near the depot, and the flagman believed that a woman passenger was not aware that the train was not at its regular stopping place, it was his duty to inform her, particularly where the ground at the switch was rough and unsafe.

5. **Evidence; Res Gestae.**—Protest made by plaintiff to the flagman of the train after alighting from the train was not part of the *res gestae*, and was properly excluded.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROW.

Action by May Franklin against the Southern Railroad Company for damages for injuries suffered while a passenger. Judgment for defendant and plaintiff appeals. Reversed and remanded.

JOHN W. ALTMAN, for appellant. STOKELY, SCRIVNER & DOMINICK, for appellee.

GARDNER, J.—Appellant brought this suit against the appellee for the recovery of damages which she claims to have sustained as a passenger on the Southern Railway in alighting from

[Franklin v. Southern Railway Co.]

the car at Coalburg, the point of destination. It was insisted by the plaintiff that when she alighted from the train she stepped on some slag, which caused her foot to turn, and sprained her ankle. The evidence for the plaintiff tended to show that she boarded the train as a passenger at Blossburg, her destination being Coalburg, in Jefferson county; that she rode in the last coach with her two children, one five years and the other nine months old; that before they reached Coalburg the flagman came through the car and called, "The next stop is Coalburg—all out for Coalburg," and shortly thereafter he came and took her suit case out and off the train; that a short time after the call was made the train stopped and the plaintiff got off, carrying the baby in her arms. Upon the trial she testified that the flagman was standing on the ground and had her suit case; that he helped her five year old child off the train, and that his face was toward her as she came out of the car door; that she stepped down a distance of about $2\frac{1}{2}$ feet, her foot striking a piece of slag or rock, which caused her foot to turn, so that she stumbled, but did not fall. The plaintiff testified that she could not tell whether she was at the station or not; that she had her baby in her arms and could not see the condition of the ground; that she had lived about three-fourths of a mile from Coalburg for about a year, and that she lived several years at Republic, which is about 2 miles from Coalburg; that she rode on the train only about once during the year and a half previous to the time of the injury complained of, and went to the station only when she intended to take the train. The evidence further tended to show that at the time the train stopped, and the plaintiff got off, the train was at the switch, which was about 150 feet from the depot, and that the car on which plaintiff was riding was then 400 or 500 feet from the depot, and that the train, after stopping at the switch, pulled on up to the station. At the place where plaintiff alighted new slag had been scattered along the track and large stones thrown down. There was also evidence tending to show that several passengers alighted from the train at the same time the plaintiff alighted. This was not the regular place for the passengers to be taken on or off the train.

The following quotations from some of our cases will be helpful in determining the result of this appeal:

In *Rich & Dan. R. Co. v. Smith*, 92 Ala. 237, 9 South. 223, it was said: "In *Smith v. Ga. Pac. Ry. Co.*, 88 Ala. 538 [7 South.

[Franklin v. Southern Railway Co.]

119, 7 L. R. A. 323, 16 Am. St. Rep. 63] the following propositions were declared: The announcement of the name of a station, being usually intended to inform the passengers that the train is approaching the point of their destination, so that they may prepare to get off when the train stops, is not, of itself, an invitation to alight; but, if the train is soon thereafter brought to a full stop, a passenger may safely conclude, in the absence of notice, that the train has arrived at the station, and attempt to get off, unless the surroundings and circumstances are such as would show to a reasonably careful and prudent man, that the train had not reached the proper landing place. These propositions rest on reason and experience, are justified by custom, conform to the understanding of railroad carriers and the traveling public, and are maintained by the strong current of authority. When a passenger, acting, in such case, under a reasonable belief that the train has stopped at his point of destination, endeavors to get off, using ordinary care, and is injured in consequence of the train having stopped short thereof, the company is liable."

And in *Mob., L. & R. R. Co. v. Walsh*, 146 Ala. 295, 40 South. 56^o, is the following: "Charge 5 ignores the principle that plaintiff has a right to rely upon the implied assurance of safety arising out of an express or implied invitation to alight, even if doubtful as to such safety, and is justified in alighting if a person of ordinary care and prudence would have done so under the circumstances."

And this from *Mont. St. Ry. Co. v. Mason*, 133 Ala. 508, 32 South. 261: "It is contended in the present case that at the time of the injury complained of the plaintiff was no longer a passenger on the defendant's car, after alighting from the same, and that the defendant was relieved of all responsibility after the plaintiff had alighted from its car onto the ground at the place where it stopped for that purpose; and this involves the question of the duty of the carrier to provide a reasonably safe place for the landing of its passengers. The same duty of exercising the highest degree of diligence and care in the carriage or transportation of passengers, in law and reason, extends to and includes the safe landing of the passenger at the termination of his journey or ride, and this duty is not performed when the carrier lands its passenger at a time and place of such unknown environment to him that in his first effort to depart, after alighting onto the ground, he is tripped and thrown by an unseen pile of lumber and debris."

[Franklin v. Southern Railway Co.]

See, also, in this connection, *B. & O. Co. v. Mullen*, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115, 3 Ann. Cas. 1015, and note; *Farrell v. Chicago, etc., Ry.*, 100 Minn. 361, 111 N. W., 388, 9 L. R. A. (N. S.) 1113 and note.

The first assignment of error treated in argument of counsel for appellant relates to the action of the court in sustaining the demurrer to count B of the complaint. This count shows the relation of the plaintiff to have been that of a passenger on the defendant railway, and alleges the announcement by the flagman that the next stop would be Coalburg, her point of destination, and that the train came to a full stop soon thereafter, but at a place other than its regular stopping place, and where there were rocks or slag, and the ground was rough and unsafe for the plaintiff to alight. It further avers the ignorance of plaintiff of the fact that she was not at the station, and that, believing that the train had stopped at its regular point for discharging passengers, she did alight therefrom, to her injury as above stated, and the count concluded that defendant negligently failed to provide the plaintiff with a safe place to alight from the said train.

(1) It is argued by counsel for appellee that this count shows upon its face that the train was not at its regular stopping place, and does not show an invitation by the defendant's employees for passengers to alight. The count shows, however, that plaintiff was not aware that the train had not stopped at its regular place for discharging passengers. The averments of the count to the effect that the station was called as the next stop, and that soon thereafter the train came to a full stop, under the above authorities, was sufficient to show an invitation for the passengers to alight. The gravamen of the action, as shown by this count, was the defendant's negligent failure to provide the plaintiff with a safe place to alight from the train. We are of the opinion that the count was sufficient and that the demurrer was improperly sustained.—*A. & B. A. L. Ry. v. Wheeler*, 154 Ala. 530, 46 South. 262.

(2) The law imposes upon common carriers the duty of exercising the highest degree of care, skill, and diligence in the transportation of passengers.—*A. G. S. Ry. v. Hill*, 93 Ala. 514, 9 South. 722, 30 Am. St. Rp. 65; *So. Ry. v. Hayes*, 194 Ala. 194, 69 South. 641. The court, at the request of the defendant, gave the following special charge, designated "C": "The court charges the jury that the flagman was not charged with any duty

[Franklin v. Southern Railway Co.]

of notifying the plaintiff not to get off the train, unless the jury find from the evidence that the flagman knew that plaintiff was going to get off the train, at the time she did, and knew that the plaintiff did not know she was not at the station."

(3, 4) In view of the evidence in the case, that the plaintiff was not aware that the train was not at the regular station, and that she says she could not see, with her child in her arms, just where it was, and of her further testimony that the flagman had his face toward her and had her suit case in his hand, having helped her five year old child off the train, the above charge should not have been given. If the flagman, under these circumstances, believed plaintiff was not aware that the train was not at its regular stopping place, then, in the exercise of that degree of care required of carriers, it would have become his duty to inform her, especially in view of the alleged rough and unsafe condition of the ground at that place.

Counsel for appellee insist that the coach from which plaintiff alighted was stopped at a point opposite the mountain side, and that as a matter of law, it being between 10 and 11 o'clock in the daytime, plaintiff was charged with a knowledge of the fact that the train had not stopped at its regular place for discharging passengers. This argument leaves out of view the testimony of the plaintiff tending to show her lack of familiarity with the surroundings at the station, the infrequency of her travel, and her positive testimony that she did not know the train was not at the station, but thought it was, and could not see otherwise, as she had her child in her arms. The charge was clearly bad, and must work a reversal of the cause.

As the cause must be reversed, we need not treat in detail other questions presented. The word "invited," used in some of the charges given for defendant, was calculated to mislead the jury, and should have been refused; but we need not determine whether it was sufficiently prejudicial to call for a reversal.

In the motion for a new trial there seems to be noted an exception to a portion of the oral charge to the jury which would indicate that the jury was instructed that the liability of the defendant rested upon its either doing that which a reasonably prudent person would not have done under similar circumstances, or failing to do that which a reasonably prudent man would have done; and it would indicate that what was said was at variance with the rule in this state, above quoted, which requires the

[Kershaw v. McKown.]

highest degree of skill and care on the part of the carrier in the transportation of its passengers. It may be doubtful whether the exception to this portion of the oral charge is properly presented here for review, so that reversible error can be predicated thereon. But this we need not determine.

(5) Plaintiff offered proof of certain protests which she alleges she made to the flagman after alighting from the train. It does not appear from this record that this was a part of the *res gestæ*, and we do not think there was any error in sustaining the objection thereto.—*Mob. L. & R. Co. v. Baker*, 158 Ala. 491, 48 South. 119.

Much is said in brief of counsel for appellee, to the effect that the testimony of the plaintiff on this trial is contradictory, in material respects, of that given on a former trial. On this question, however, we are not here called upon to pass.

It results, from what is said herein, that the judgment of the court below must be reversed.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Kershaw v. McKown.

Damage for Killing Dog.

(Decided May 18, 1916. 72 South. 47.)

1. **Animals; Killing; Responsibility.**—It is a question of fact for the jury whether there is an apparent necessity for killing an animal to protect human beings or property which the animal is attacking.

2. **Same.**—Where the action was for killing a dog, a charge asserting that if the dog was not worth greatly more than the goat it was attacking, and if the dog was acting in a way that would lead a reasonably prudent man to conclude that it was necessary to kill the dog to save the life of the goat, or to save it from great bodily harm, the verdict should be for defendant, was not error.

3. **Same.**—In such an action the court properly refused to charge that if the goat which was being attacked was of less value than that of the dog, or the value of the two was not greatly disproportionate, the verdict should be for the plaintiff for the value of the dog killed, and that if defendant could have given the dog away and thus have saved the goat from harm or death, he had no right to kill the dog.

[Kershaw v. McKown.]

APPEAL from DeKalb Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by C. G. Kershaw against J. H. McKown for damages for killing a dog. From a judgment for defendant, plaintiff appeals. Transferred from the Court of Appeals under Act April 18, 1911, p. 449, § 6. Affirmed.

See, also, 12 Ala. App. 48, 68 South. 559.

The court's charge for defendant is as follows: If you believe from the evidence that the dog here sued for was not worth greatly more than the goat, and if you further believe that the dogs were acting in a way that would lead a reasonably prudent man to conclude that it was necessary to kill these dogs in order to save the life of the goat or save it from great bodily harm, then you should render a verdict for defendant. The charges refused to plaintiff asserted the proposition that, if the goat which was being attacked was of less value than that of the dog killed, or if the value of the two was not greatly disproportionate, the verdict should be for the plaintiff for the value of the dog killed, and that, if defendant could have driven the dogs away, and thus save the goat from harm or death, then he had no right to kill the dog.

DAVIS & BAKER, for appellant. ISBELL & SCOTT, for appellee.

THOMAS, J.—This case was formerly before this court by transfer from the Court of Appeals as provided by law.

(1) The decision therein was to the effect that, where defendant shot a dog attacking his domestic animals, the fact that its owner had no notice of the dog's vicious propensities had no bearing upon the right of the defendant to kill it; that this right to kill, of necessity, depended solely upon the circumstances of the case, the probable amount of the loss, and the apparent imminence of the danger.—*Crow v. McKown*, 192 Ala. 480, 68 South. 341, L. R. A. 1915E, 372.

In *Nesbett v. Wilbur*, 177 Mass. 200, 58 N. E. 586, Chief Justice Holmes said: "No doubt, such a justification as that relied on depends upon a number of variable facts, the imminence and nature of the danger, the kind of property in peril, from whom or what the danger proceeds, the relative importance of the harm threatened, and that which is done in defense."

The suit in the *Nesbett Case* was for the alleged unlawful killing of the plaintiff's dog while it was engaged in killing the

[Kershaw v. McKown.]

defendant's hens on the defendant's premises. The court found no error in the finding of the trial court that: "The defendant rightly believed that there was no other way to save them [the hens] than to kill the dog, and he was justified in doing so."—*Marshall v. Blackshire*, 44 Iowa 475.

So in *Anderson v. Smith*, 7 Ill. App. 354, 358, 359, the court thus states the rule: "The law from the earliest times has recognized the right of a man to defend his property against the unlawful acts of man or beast; the question in the adjudicated cases not being whether such right of defense existed, but whether it was properly exercised in the given case. This right of defending property from unjustifiable seizures, attacks, or destruction is inseparably connected with and necessarily attaches to and springs from the natural right of acquiring, holding, and enjoying property. * * * A party having the right to defend his person and property, his justification must, in the very nature of things, depend upon the fact whether, in the given case, he has exercised that right in a reasonable or an unreasonable manner, taking into consideration all the circumstances of the case surrounding the transaction, and in this regard every case must be determined from its own circumstances; for it is impossible to establish an iron rule of law that will fully meet the exigencies of every case that may possibly arise. The most that can properly be said as a rule of law is, that there must be an apparent necessity for the defense, honestly believed to be real, and then the acts of defense must in themselves be reasonable. Acts beyond reason are excessive. The consequences of the proposed act to the aggressor should be considered in connection with the consequences of nonaction to the party defending, whether the defense be made in favor of person or property; and in case of defense of domestic animals from attacks of other animals the relative value of the animals may be a proper circumstance for the jury to consider in arriving at a conclusion whether the defense was a reasonable one under the circumstances.—Cooley on Torts, § 346."

Mr. Cooley collects the cases to the effect that a vicious animal may lawfully be killed, though the circumstances would not support an action against the owner, as where a dog is actually doing mischief (*Wadhurst v. Damrue*, Cro. Jac. 45; *Vere v. Cawdor*, 11 East 569; *Barrington v. Turner*, 2 Lev. 28; *Protheroe v. Matthews*, 5 C. & P. 581; *Putnam v. Payne*, 13 Johns. [N. Y.]

[Kershaw v. McKown.]

312), or where, if it becomes necessary in order to protect against him, the dog may be killed whether the owner has or has not notice of his disposition (*Gillum v. Sisson*, 53 Mo. App. 516; *Fenton v. Bisel*, 80 Mo. App. 135; *Fisher v. Badger*, 95 Mo. App. 289, 69 S. W. 26).

In *Lipe v. Blackwelder*, 25 Ill. App. 119, the defendant had killed the plaintiff's dog which was trespassing upon his wheat-field, and a verdict for the defendant was affirmed. The court said: "Every man has a right to defend and protect his property of every kind and character from injury or destruction, provided he uses only such means as are reasonably necessary under the circumstances. And the reasonableness or unreasonableness of the means is always a question of fact for the jury."

Before one could be justified in killing the dog it would be necessary to show that protection to human beings, or more valuable property, appears to require it.—*Woolf v. Calker*, 31 Conn. 121, 81 Am. Dec. 175; 2 Cooley on Torts (3d Ed.) 703.

It is apparent from an examination of the many authorities on this question that no "iron rule of law" will fully meet the exigencies of every case that may arise, and that the apparent necessity to kill the animal in order to protect human beings or property is a question of fact for the jury.—*Miller v. Seeley*, 90 Mich. 221, 51 N. W. 366; *Lipe v. Blackwelder*, *supra*; *Anderson v. Smith*, *supra*.

An examination of the evidence convinces us that the defendant, acting on the reasonable appearances of the attack on his animal by dogs, was properly justified by the verdict of the jury. The affirmative charge requested by the plaintiff was properly refused.

(2) When the oral charge of the court is considered in its entirety, it is clear that no reversible error was committed by the court. So the charge given at defendant's request was not error. The defendant had the right to act on the reasonable appearance of things in defending his property from such attack.

(3) Under the facts of the case the court properly refused the charges requested by plaintiff, numbered from 1 to 5, inclusive.

There was no error of the court in its rulings on the pleadings and on the admission of evidence.

The case is affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

[City of Birmingham v. Hawkins.]

City of Birmingham v. Hawkins.

Personal Injury.

(Decided April 20, 1916. Rehearing denied June 1, 1916.
72 South. 25.)

1. **Trial; Verdict; Change.**—Where the action was against a city and its police officer for personal injuries inflicted upon plaintiff's minor son, and the jury returned a verdict for plaintiff, with damages against the city in the sum of \$50, and against the officer in like amount, the action of the court in changing the verdict to a verdict for plaintiff in the sum of \$100 was erroneous, as it was a change not only of the form, but of the very substance of the verdict in respect to the liability of each of defendants.

2. **Same; Apportionment.**—Where the suit is against joint tort feorsors, a jury cannot sever by apportioning the damages, as such an apportionment is impractical, since as soon as there is one satisfaction, the remedy is extinct as to all other joint tort feorsors.

3. **Parties; Joinder; Tort Feorsors.**—Joint tort feorsors may be sued jointly or severally.

4. **Trial; Verdict; Form.**—Where the verdict was for plaintiff with damages against defendant in separate amounts, the trial court should have refused to receive the verdict, and should have sent the jury back for further consideration.

5. **Same.**—There is no particular form in which the verdict may be rendered, it may be either written or oral. General verdicts are sufficient if they respond in substance to every material fact involved in the case, and when the verdict is so responsive, the court commits no error in putting it in form.

6. **Same; Modification; Substance.**—Where a verdict is imperfect in substance, and does not respond affirmatively or by necessary implication to the issues as formed, the presiding judge cannot put it in form, as his attempt to do so would be the verdict of the court, and not the verdict of the jury.

7. **Appeal and Error; Parties; Statute.**—An appeal by one of several parties to a judgment is authorized by § 2884, Code 1907, as amended by Acts 1911, p. 589.

8. **Same; Mode; Waiver.**—Where no point was made or taken at or before the submission of the case that a proper notice of the appeal had not been given or served on the other defendant, and no severance or separate assignment of errors, there was a waiver as to such by appellee.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by L. D. Hawkins against the city of Birmingham, and one of its police officers, for damages for injuries inflicted upon plaintiff's minor son, in an automobile or motorcycle col-

[City of Birmingham v. Hawkins.]

lision. Judgment for plaintiff, and defendant city appeals. Reversed and remanded.

(Transferred from Court of Appeals under act creating said court.)

ROMAINE BOYD, and M. M. ULLMAN, for appellant. ALLEN, BELL & SADLER, for appellee.

MAYFIELD, J.—Appellee sued appellant city and one J. B. Palmer to recover damages for injuries inflicted upon plaintiff's minor son. The injuries were inflicted in consequence of an automobile or a motorcycle, which was being driven by the defendant Palmer, striking or running over plaintiff's son. The boy, at the time of the injury, was playing in one of the public streets of the city of Birmingham. Palmer, by order of the desk sergeant of the police department of the city of Birmingham, was driving the automobile from the city hall, in Birmingham proper, to a substation of the police department situated in West End, Birmingham; and his mission was the carrying of a bicycle used by the police department from one station to the other. The city claimed, and renews its claim here, that Palmer was one of its policemen, and at the time and on the occasion of the injury was engaged in the performance of a part of his official duties as such policeman; that the employment and use of policemen is one of a city's governmental functions, as distinguished from its corporate or business functions; and that for the acts of a policeman such as are here shown and complained of a municipality is not liable. This issue was attempted to be raised by the pleadings, but it was not raised in such sort that it can be treated on this appeal. Appellee claims that the evidence does not show without dispute that Palmer was a police officer and in the discharge of his police duties at the time and on the occasion in question. The evidence does show without dispute, however, that the automobile and the bicycle were owned or controlled by, and used in the business of, the police department of the city, and that they were being transported at the time and on the occasion of the injury from one station to another, by order and under direction of the police department, and that Palmer was there and had been commissioned or authorized to act as policeman of that department of the city government. Under this state of facts, if the question

[City of Birmingham v. Hawkins.]

was properly raised and presented, we would have to hold, under a long line of decisions and most all of the authorities on the subject, that the city would not be liable for the injury inflicted on account of the negligence or wanton injury of which plaintiff complains. However, as the case must be reversed, and the evidence may be different on another trial, we decline to now pass upon the question of liability of the city *vel non*. The city and Palmer were sued jointly; and when the case was submitted to the jury it was agreed between the parties that, if a verdict was returned in their absence, it would or should be put in proper form. The jury returned with a verdict for plaintiff as against both defendants for \$50 against each separately.

The motion for a new trial as to the return, reception, and change, of the verdict by the jury and the court, contains the following recitals, and the bill of exceptions states that those recitals are admitted to be true:

“Because at the time the jury returned the verdict in said cause, this court was not in session, and the jury returned a verdict in the following words, to-wit: ‘We, the jury, find for the plaintiff and assess his damages against the city of Birmingham in the sum of fifty dollars and against J. B. Palmer in the sum of fifty dollars. Robert E. Terry, Foreman.’ And thereupon the said jury was disbanded, which said verdict was returned and delivered to the bailiff on the afternoon of the 29th of October, 1914, and on the morning of the 30th day of October, 1914, said verdict was delivered to the trial judge, who thereupon entered upon the trial docket in said cause the verdict of the jury in the exact language as returned, and the plaintiff in said cause thereupon in open court insisted that the entry of said verdict on the record should be changed so as to read, ‘We, the jury, find for the plaintiff and assess his damages at one hundred dollars.’ And the defendants further show that, in the absence of the defendants’ counsel but after the notice to the defendants’ counsel as hereinafter stated, the court interrogated the members of the said jury as to what their intentions were in returning said verdict, and the court, acting upon information received from said jury, and the wording of the verdict, thereupon erased from the trial docket the original entry of said verdict and substituted in lieu thereof the entry in the following words: ‘October 30, 1914. Verdict and judgment for the plaintiff for one hundred dollars.’ And the defendants

[City of Birmingham v. Hawkins.]

further show that the honorable Chas. W. Ferguson, presiding judge at said trial, after the said jury had been disbanded and had been relieved of further consideration of said cause, and after counsel for the defendants and the defendant had departed from the court, on, to-wit, the 30th day of October, 1914, and about five minutes before the jury were interrogated, instructed the clerk of said court to call the defendants' counsel over the telephone and request him to come into court as the court desired to interrogate the members of the jury which had theretofore tried said cause as to the meaning of their verdict, and the clerk did thereupon communicate with defendants' counsel over the telephone and impart said information, and the defendants' counsel stated to said clerk that he was engaged at that moment and could not come to court before fifteen or twenty minutes and requested the said clerk to so inform the court and ask him to wait until the defendants' counsel could be present in court and object to any such procedure, and the clerk of said court thereupon imparted said information to the court, at which time the jury had not been interrogated, and shortly thereafter, the clerk returned to the telephone and informed the defendant's counsel that the court had already interrogated the persons who had formerly been members of said jury, which interrogation was done in the meantime, and that the said jury had informed the court that it was their intention that the plaintiff should recover \$100, and that the court had thereupon entered a judgment for \$100, and that he would give the defendants an exception to the entire procedure. It was agreed in open court and before the jury retired originally to consider the case that, if the judgment was not in form, it might be put in form and might be received by the clerk or bailiff if the court was not in session and was so received."

(1) This action of the court was reversible error, and the court should have granted a new trial on this account. This, because there had been a change, not only of the form, but of the very substance of the verdict, so far as each of the defendants was concerned. It is true that the aggregate amount of the verdict assessed for the plaintiff was the same under either entry; but the clear intent of the jury, as expressed by their original verdict, was that each of the defendants should be liable for only \$50 as damages, while the changed verdict made each liable for \$100.

[City of Birmingham v. Hawkins.]

(2, 3) It was decided by this court at an early date, in the case of *Layman v. Hendrix*, 1 Ala. 212, 215, that an apportionment of damages against several tort-feasors was impracticable, for the reason that, under the law, as soon as there was one satisfaction, as against one tort-feasor, there was satisfaction, and the remedy was extinct as to all other joint tort-feasors. This, of course, is injurious to the plaintiff and not to the defendant, and the plaintiff only can complain. It is also true that a plaintiff may sue joint tort-feasors jointly or separately; but he can have but one satisfaction. If, however, he sues jointly, as in this case, the jury cannot, as in this case attempted, sever by apportioning the damages. The plaintiff had the right to have the error corrected, but not in the way attempted by the lower court. What was said in the case of *Layman v. Hendrix*, *supra*, is apt here: "The verdict * * * is for all purposes the assessment of several damages; it declares that the plaintiff has sustained damages to the amount of \$1,000 which it apportions among the defendants, and directs to be levied of them severally, in specific proportions. This could have been cured, as we have already shown, by entering a nolle prosequi as to all but one, and taking judgment against him only, for the sum assessed against him; or the plaintiff could have set aside the verdict for the irregularity, and have had a new trial."

(4) The trial court could have declined to receive the verdict, and sent the jury back for further deliberation; but it could not correct the verdict, as was attempted, because it involved a change in substance, and not in form, as we have above shown.

(5, 6) The following are the rules of law and procedure which govern in cases like this: "As a rule, there is no particular form in which verdicts shall be rendered. General verdicts are always sufficient, if they respond in substance to every material fact involved in the issue. And doing this, the court commits no error by putting the verdict in form. The verdict may be either written or oral, and it is always sufficient, if it respond substantially to the questions of right the issue or issues raise. All else is form, which the court can supply with or without the consent of the jury.—*Ewing v. Sanford*, 21 Ala. 157.

"It is different when the verdict is imperfect in substance, and does not respond affirmatively, or by necessary implication, to the issues as formed. Such verdict is imperfect, not in form, but in substance. The presiding judge should not receive an

[City of Birmingham v. Hawkins.]

imperfect verdict, but should remand the jury for further deliberation, under appropriate instructions. If the court were to attempt to aid such verdict, it would become, not the verdict of the jury, but of the court.—*Lee v. Campbell*, 4 Port. 198; *Sewell v. Glidden*, 1 Ala. 52; *Layman v. Hendrix*, 1 Ala. 212; *Wittick v. Traun*, 27 Ala. 562 [62 Am. Dec. 778]; *Clay v. State*, 43 Ala. 350; *Walters v. Junkins*, 16 Serg. & R. [Pa.] 414 [16 Am. Dec. 585]; Proffat on Jury Trials, § 456.—*St Clair v. Caldwell & Riddle*, 72 Ala. 528.

(7, 8) It is insisted by appellee: (1) That there should be no consideration of the appeal, because taken in the name and on account of one only of the two defendants against whom a final judgment was rendered; and (2) because there was no severance and no separate assignment of errors by each of the defendants. The first contention cannot be sustained, for the reason that the statute now authorizes an appeal by one only of several parties to a judgment.—Code, § 2884; Acts of Legislature, 1911, p. 589. No point was made or taken, at or before submission, that a proper notice of the appeal had not been given or served on the other defendant, and hence there was a waiver as to this matter by appellee, if the ground ever existed.

"The mode, but not the time of taking an appeal, may be waived; the one is jurisdictional, the other not. Amendable defects will be considered as waived, unless raised before the submission. This court does not favor the dismissal of appeals for defects in the mode or manner of taking them, if the defect could and would have been amended if raised in time.—*Kidd v. Turner*, 52 Ala. 251; *Thompson v. Campbell*, 52 Ala. 583; *Coffey v. Norwood*, 81 Ala. 512, 8 South. 199."—*Wynn v. Adm'r v. Bank*, 168 Ala. 483, 53 South. 234.

This record is a good one to illustrate the justice and propriety of the above rule. Suppose the point as to notice had been taken before submission: The record shows that the objection would have been met by the other defendant's appearing, and declining to join in the appeal or waiving his right to assign errors. The record contains the following to this end: "Now comes J. B. Palmer, and waives summons, notice of appeal and consents to a severance, and waives the right to assign errors separately. M. M. Ullman, Attorney for J. B. Palmer."

There is, of course, no occasion, much less necessity, for a severance, to allow separate assignments of error, where the ap-

[Bailey v. Southern Railway Co.]

peal is taken in the name, and on account of only one defendant.

It follows therefore that judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Bailey v. Southern Railway Co.**Crossing Accident.**

(Decided May 18, 1916. 72 South. 67.)

1. **Railroads; Crossing Accident; Wantonness.**—The fact that a train approached the town crossing, over which several hundred people and vehicles passed daily, at a rate of speed not exceeding 3 or 4 miles per hour, and without any signals or actual knowledge of the approach of plaintiff's automobile, did not render the engineer guilty of wantonly or intentionally striking said automobile.

2. **Same; Contributory Negligence.**—Although defendant may have been guilty of simple negligence in failing to ring a bell, or blow a whistle as its train approached a town crossing, and in leaving box cars on its sidetrack so as to unreasonably obstruct the view of travelers as to approaching trains, yet the failure of plaintiff's chauffeur to stop his car and look and listen before attempting to cross the main track, and in crossing it at a speed of not less than 2 miles an hour, was, as a matter of law, contributory negligence, barring a recovery for damages to the car.

APPEAL from Marengo Law and Equity Court.

Heard before Hon. B. F. GILDER.

Action by Ernest M. Bailey against the Southern Railway Company for damages to an automobile. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff's automobile was being driven along the main street of the town of Faunsdale 7 p. m. November 29th, and crossed defendant's track near its depot at a speed of not less than two miles an hour, without stopping in front of the track. Defendant's train on the main line, running three or four miles an hour, collided with the automobile. About 10 box cars stood on defendant's side track between the automobile and the main track, and obstructed the chauffeur's view until after he passed over the siding, which was eight feet from the main track. Plaintiff and the chauffeur both testified that they did not hear

[Bailey v. Southern Railway Co.]

either bell or whistle from the engine, and did not see or know of the approach of the train until it struck them. The trainmen did not see the automobile until the engine got on the crossing. Several hundred people or vehicles pass over the crossing daily. The complaint charges both simple and wanton negligence, and the defendant pleaded the general issue and contributory negligence.

GEORGE PEGRAM, for appellant. PETTUS, FULLER & LAPSLEY, E. E. TAYLOR, and MCDANIEL & WHITFIELD, for appellee.

SOMERVILLE, J.—(1) The mere fact that a train approached a town crossing, over which several hundred people and vehicles pass daily, without warning signal of bell or whistle, does not constitute wanton or willful wrong, unless it does so at a high and dangerous rate of speed.—*Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 262, 9 South. 230; *L. & N. R. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374; *M. & C. R. R. Co. v. Martin*, 117 Ala. 383, 23 South. 231; *Weatherly v. N. C. & St. L. Ry. Co.*, 166 Ala. 589, 51 South. 959.

In the present case it must be said, as a conclusion of law, that, in approaching this crossing at a speed of three or four miles an hour, without actual knowledge of the approach of the automobile, the engineer was not guilty of wantonly or intentionally striking the plaintiff's car. This issue was therefore properly eliminated from the consideration of the jury.

(2) Conceding that defendant's servants were guilty of simple negligence in omitting to ring the bell or blow the whistle, and also in leaving box cars on its side track so as to unreasonably obstruct the view of approaching trains by those who might cross its tracks, nevertheless it is clear beyond dispute that the failure of plaintiff's chauffeur to stop his car and look and listen before attempting to cross the main track was the proximate cause of the collision, and hence that as matter of law he was guilty of such contributory negligence as to bar a recovery.—*L. & N. R. R. Co. v. Turner*, 192 Ala. 392, 68 South. 277; *South. Ry. Co. v. Irwin*, 191 Ala. 622, 68 South. 139; *L. & N. R. R. Co. v. Williams*, 172 Ala. 560, 55 South. 218.

In the *Turner Case* we said: "In short, common sense must disclose as indisputable truth that no person having the senses of sight and hearing, with even the most rudimentary intelli-

[Bailey v. Southern Railway Co.]

gence, can ever be so ignorant of the approach of a single train at a railroad crossing in broad daylight as to collide with it, without being guilty of a flagrant want of common care and prudence."

This is equally true of the approach of a single train at night when it carries a bright headlight on its engine, as in the present case.

Had the chauffeur stopped, he must have heard the rumble of a train then almost upon him. Had he looked up and down the track, as he should have done before driving his car ahead, he must have seen the headlight.

In the case of *C. of Ga. Ry. Co. v. Hyatt*, 151 Ala. 355, 43 South. 867, the collision was with a detached engine, running at night without a headlight in advance of an engine and train, the noise of which drowned the noise of the single engine. Whether the plaintiff's failure to stop, look, and listen was the proximate cause of his injury, was in that case properly held to be a question of fact for the jury.

There are no such circumstances here, and, indeed, the box car obstruction only emphasized the necessity of observing the duty of stopping, looking, and listening at a point where it would have been effective.

Since the general affirmative charge might have been given for the defendant, we need not consider the several errors assigned on testimony and refused charges. We remark, however, that an examination of them does not disclose any reversible error.

The judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

[Louisville & Nashville R. R. Co. v. Jenkins.]

Louisville & Nashville R. R. Co. v. Jenkins.

Frightening Animal.

(Decided May 18, 1916. 72 South. 68.)

1. **Trial; Directing Verdict.**—If, when plaintiff has introduced all his evidence, it does not tend to prove his cause of action, the court may refuse to hear evidence from defendant, but it is only in the absence of all evidence against defendant that the court should direct a verdict; if there be any evidence tending to establish plaintiff's case, the court should not withdraw the cause from the jury.

2. **Railroads; Frightening Animals.**—Where the negligent act of a railroad's servant in operating its train was a continuing contributing cause to frightening plaintiff's mule, resulting in injury to plaintiff, he has a cause of action against the railroad.

3. **Appeal and Error; Specification of Evidence.**—Where the distance indicated by witness was such as "from here to the jury box" or "from here to the spittoon" they should have been given more specifically in the bill of exceptions, since they might involve a contradiction; the bill reciting that it contained all the evidence.

4. **Railroads; Frightening Animals.**—The general rule is that for an injury resulting from the frightening of a horse in the proper operation of a train, or other instrumentalities of a railway, no damages are recoverable, but where an engine is managed in such a reckless and negligent manner as to frighten a horse and cause it to run away, the company is liable for the consequences; such as where the engineer suddenly discharges a jet of steam near a passing team, or allows the steam to escape at a crossing or near a highway, making a great noise, when teams are approaching, especially when it is unnecessary.

5. **Same; Jury Question.**—Questions whether the road's agent in charge of the engine which is alleged to have frightened plaintiff's mule, saw plaintiff and the frightened mule which he was trying to drive or control, was for the jury under the evidence.

6. **Same.**—Whether defendant's agent operating the engine, if he became aware of plaintiff's presence driving the frightened mule, under the circumstances of the place, and of the situation, exercised due care not to frighten, or not to increase the fright of the mule, was a question for the jury under the evidence.

7. **Witnesses; Competency; Knowledge.**—The testimony of a physician that he believed he treated plaintiff for hernia last spring, and believed he remembered plaintiff telling him that it was bothering him some, was properly received.

8. **Evidence; Competency.**—Where plaintiff had testified that steam was coming from the cylinder cock, and the witness had explained how the steam escaped through such cylinder cock, and there was evidence from which the jury might infer that the engineer knew of plaintiff's nearness and peril, the witness was properly allowed to answer the hypothetical question if an en-

[Louisville & Nashville R. R. Co. v. Jenkins.]

gine was running along a railroad parallel with the highway, and on meeting a party coming in the opposite direction the cylinder cocks were open and the steam escaping out on the road, how long would it take the engineer to cut off steam until the engine had passed.

9. **Railroads; Frightening Animals; Instructions.**—Although a railroad has the right to operate its trains along its tracks parallel with a highway in the usual manner, and with the usual and customary noises, without liability to a driver of an animal frightened thereby, yet if the peril of the driver was apparent to the agent of the road in charge of the engine, such agent owed the driver the duty to shut off unnecessary escaping steam at the cylinder cocks, to allay the fright of the animal, when it could have been instantaneously done without interfering with the operation of the train.

APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by J. C. Jenkins against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under Act of April 18, 1911 (Laws 1911, p. 449), § 6. Affirmed.

The facts sufficiently appear. The defendant objected to the following evidence and moved to exclude it: Dr. Hays, testifying said: "I believe I treated Jenkins for rupture last spring. I believe I remember him telling me it was bothering him some."

The following question was asked witness Buell: "If an engine was running up along the railroad parallel with the public highway, and should meet a party traveling along that road going in an opposite direction meeting the engine, and the cylinder cocks were open, and steam escaping out on the road, how long would it take the engineer to cut off steam until the engine had passed the party?"

The following is charge 1 refused to defendant: "The court charges the jury that defendant had the right to use its track, and to make all the usual noises incident to the running and moving of trains; and, if you believe from the evidence that nothing but this was done by defendant's agents and servants, then, even if plaintiff's mule did run away and hurt him, your verdict must be for defendant.

GEO. H. PARKER, and EYSTER & EYSTER, for appellant. A. A. GRIFFITH, and CALLAHAN & HARRIS, for appellee.

THOMAS, J.—The bill of exceptions is established in this cause pursuant to appellant's motion to that end. The case was

[Louisville & Nashville R. R. Co. v. Jenkins.]

tried on two counts of the complaint. The first count charges simple negligence on the part of defendant's agents or servants, acting within the scope of their employment, whilst engaged in the operation of one of defendant's trains, in that, while plaintiff was on a public highway a short distance north of Garden City, "the agents and servants of the defendant in charge of said locomotive so negligently conducted themselves in and about the operation and handling of said locomotive" that as a proximate consequence thereof plaintiff's mule was caused to run away, and so inflict plaintiff's injury. The second count alleges negligence on the part of defendant's agents and servants in and about the operation of said engine, leading to the result that plaintiff's mule became frightened and was caused to run away; and that as a proximate consequence of this negligence in the handling and operating of said locomotive plaintiff was caused to sustain the injuries complained of. The defendant pleaded not guilty, offered no evidence on the trial, and requested the affirmative charge which the court refused.

(1) Where the plaintiff has introduced his evidence, and it does not tend to prove the cause of action, the court may refuse to hear the evidence of the defendant; but it is only in the absence of all evidence against the defendant that the court should direct a verdict. If there be any evidence which tends to establish the plaintiff's case, the court should not withdraw the cause from the jury.—*Tobler v. Pioneer M. & M. Co.*, 166 Ala. 517, 52 South. 86; *McCormack Co. v. Lowe*, 151 Ala. 313, 44 South. 47; *M. J. & K. C. R. R. Co. v. Bromberg*, 141 Ala. 258, 37 South. 395; *Shipp, et al. v. Shelton*, 193 Ala. 658, 69 South. 102; *Amerson v. Corona, etc., Co.*, 194 Ala. 175, 69 South. 601; *Holmes v. Bloch, infra.*, 71 South. 670.

(2) If, as a continuing contributing cause, the negligent act of defendant's agent and servant, in the manner alleged in the complaint, proximately resulted in plaintiff's said injuries, a recovery may be had.

The plaintiff's evidence tended to show that as he was driving a mule to a buggy, southward along the public road to Garden City, the mule became frightened by a freight train approaching from the rear, and passing; that the mule was "jumping around," "getting scared," becoming "frightened," but witness was "managing to hold him in the road," when defendant's engine, coming from the south, met driver and mule in close

[Louisville & Nashville R. R. Co. v. Jenkins.]

proximity, "squirting" and puffing steam towards the road and mule, causing the mule to run away, and thereby inflict injuries on the plaintiff, among them a rupture—inguinal hernia. The evidence further shows that the public road along which plaintiff was traveling, and where the "runaway" occurred, was parallel with defendant's railroad and very close thereto, one of the two eye witnesses indicating the distance between plaintiff and the ties by the expression, "there was just a ditch there, some few feet," and the other witness stating that the road was as close to the railroad track "as from here to the jury box, * * * the public road comes pretty close to the railroad track, as close as from here to the spittoon," and stating that there was a high perpendicular wall on the west side of the public road, and the railroad on the east side of it, with barely a driveway along there.

The evidence as to the conduct of the defendant in the operation of the engine just before, and at the time of passing, as given by the witness, was that the engine was making noise, that steam was puffing from around the cylinder, at the head of the engine, and coming out of the cylinder cocks, and puffing out towards the road as the engine approached Mr. Jenkins and the mule; that "the engineer could have seen him all right. It was a plain, open way. The public road runs right by the railroad, parallel, as close as from here to that spittoon."

On cross-examination one witness stated that the engine was working just steam enough to pull out of the switch, that it was puffing as it started, like it always does, and not making any unusual noise, and was "squirting steam out toward the road and toward the mule." And on further cross-examination this witness said that: "The mule and engine met, just about the time the steam was puffing out, met, and the engine got a little above it, that is, past the mule about 20 yards, when it commenced to emit that steam."

The evidence showed that a man was on the west side of the engine, with his head out of the window, looking westward or northwestward; that there was nothing to obstruct his view to where plaintiff and the frightened mule were.

An experienced engineer testified to the effect that at the end of each cylinder of an engine, where the team escapes, is what is called a "cylinder cock," on the bottom of the cylinder; from there there runs to the cab of the engine a rod by means of which

[Louisville & Nashville R. R. Co. v. Jenkins.]

the cocks may be instantly opened or closed; they are opened to let out of the cylinder the water condensed from the steam; and it is not essential to the operation of the engine to have the cylinder cocks open all the time for the escape of water and steam.

(3) This court can hardly know, as did the trial court, how close to the engine Mr. Jenkins and his mule were, as was to be gathered from such expressions as "from here to the jury box," "to the spittoon," etc. The indicated distances should have been given more specifically in the bill of exceptions. Such references to the locus in quo might involve a contradiction in a bill of exceptions reciting that it contains all the evidence.—*Ala. T. R. Co. v. Benns*, 189 Ala. 590, 66 South. 589; *Warble v. Sulzberger Co. of America*, 185 Ala. 603, 64 South. 361; *Sloss-Sheffield S. & I. Co. v. Redd*, 6 Ala. App. 404, 60 South. 468; *Continental Gin Co. v. Milbrat*, 10 Ala. App. 351, 65 South. 424. However, as we have pointed out, these expressions of proximity to the engine (a very important fact under the allegations of each count) have some explanation in the description of the place with the perpendicular embankment on the west of the public road and the ditch and the railroad on the east side, and in the statement of the witness that: "Between me and the ties (meaning, of course, the cross-ties of the railroad) there was just a ditch there—some few feet."

(4, 5) We will therefore consider the action of the trial court in declining to give the affirmative charge requested by defendant.

Did the defendant, under the circumstances of time, place, and the reasonable appearance of fright in the mule (if in fact defendant's agent operating the engine observed the fright) owe the duty to the plaintiff to so operate the engine as not to increase the panic, or as to allay the panic, of the animal, provided this could be done consistently with the due operation of the engine and train?

Mr. Wood, in his work on Railroads (volume 2, p. 324), thus states the general rule as to frightening teams: "For an injury resulting from the frightening of a horse in the proper operation of a railway, no damages are recoverable; but when an engine is managed in such a reckless and negligent manner as to frighten horses, and cause them to run away, the company is liable for the consequences—as, where the engineer suddenly discharges a

[Louisville & Nashville R. R. Co. v. Jenkins.]

jet of steam near a passing team, or allows the steam to escape at a highway crossing, or near a highway, making a great noise, when teams are approaching, especially when it is necessary."—*Stamm v. Sou. R. Co.*, 1 Abb. N. C. (N. Y.) 438; *Presby v. Grand Trunk R. Co.*, 66 N. H. 615, 22 Atl. 554; *Louisville, etc., R. Co. v. Schmidt*, 81 Ind. 264; *Statt v. Grand Trunk*, 24 U. C. C. P., 347; *Gibson v. St. Louis, etc., R. Co.*, 8 Mo. App. 488; *Indianapolis, etc., R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551.

See, also, *Paine v. City of Rochester*, 59 Hun. 627, 14 N. Y. Supp. 180; *Keech v. Rome, etc., R. Co.*, 59 Hun. 617, 13 N. Y. Supp. 149; *Harrell v. Albemarle, etc., R. Co.*, 110 N. C. 215, 14 S. E. 687; *Culp v. Atchison, etc., R. Co.*, 17 Kan. 475; *Wabash R. Co. v. Speer*, 39 Ill. App. 599 (unnecessary use of whistle); *Albee v. Chappaqua Mfg. Co.*, 62 Hun. 223, 16 N. Y. Supp. 687 (same); *Gulf, etc., R. Co. v. Box*, 81 Tex. 670, 17 S. W. 375.

The author's use of the word "necessary," with which the quotation is closed, is an error of the text; it should be "unnecessary," as shown by the context and by the authorities cited by him in support of his statement of the rule.

In *Gibson v. St. L., K. C. & N. R. Co.*, 8 Mo. App. 489, the facts stated were somewhat similar to the facts of the instant case, and the holding was that it was a jury case.

This court has stated the law in such cases as follows: "The authority to operate a railroad includes the right to make the noise incident to the movement and working of its engines, as in the escape of steam, and the rattling of cars; and also to give the usual and proper admonitions of danger, as in the sounding of whistles, and the ringing of bells. It is not liable for injuries occasioned by horses, when being driven on the highway, taking fright at noises occasioned by the lawful and reasonable exercise of these rights and duties. But, if the acts of the servants occasioning the fright are wanton and malicious, and are done in the discharge of their business by using the appliances of the company, such as wanton whistling of the engine, and the reckless discharge of steam, the company will be liable.—1 Rorer on Railroads, 704; Pierce on Railroads, 348."—*Stanton v. L. & N. R. R. Co.*, 91 Ala. 386, 8 South. 798.

Chief Justice McCLELLAN, in the case of *Ala. Gr. So. R. R. Co. v. Fulton*, 144 Ala. 332, 340, 341, 39 South. 282, 284, says: "But the road along which he had been traveling and upon which it was his purpose to cross the railway as soon as defendant's

[Louisville & Nashville R. R. Co. v. Jenkins.]

train, or engine got out of the way, was not a public road. Therefore defendant's trainmen were under no duty to keep a lookout for him, but their duties in respect of him arose only after they became aware of his presence and peril. If, after becoming aware that his mule was becoming frightened by the engine, or the noises being made by the operation of the engine, they failed to use every means at hand which a man of ordinary care and prudence would have had recourse to allay the fright of the animal, such as abating the noises, stopping the engine, that being practicable, etc., and injury resulted from such failure to the plaintiff, the defendant would be liable in damages in this action.—*Glass v. Mem. & Char. R. R. Co.*, 94 Ala. 581 [10 South. 215]; *Ala. Gr. So. R. R. Co. v. Linn*, 103 Ala. 139 [15 South. 508]; 23 Am. & Eng. Ency. Law, pages 744, 745."

"Whether there was negligence in a given case of fright must depend upon proper care vel non on the part of those in charge of the train," is the statement in *C. of Ga. Ry. Co. v. Fuller*, 164 Ala. 196, 200, 51 South. 309, 310, where the *Fulton Case* was reaffirmed. So in *Ala. C. C. & I. Co. v. Cowden*, 175 Ala. 108, 115, 56 South. 984, 987, also following the *Fulton Case*. In the opinion in the *Cowden Case* it is said: "It follows as of course that the mere want of necessity for making or allowing the noise, without more, is not negligence to liability for injury or damage resulting therefrom.—*Stanton v. L. & N. R. R. Co.*, 91 Ala. 382, 8 South. 798; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376, 13 South. 553; *Levin v. M. & C. R. R. Co.*, 109 Ala. 332, 19 South. 395; *L. & N. R. R. Co. v. Lee*, 136 Ala. 182, 33 South. 897, 96 Am. St. Rep. 24; *So. Ry. Co. v. Crawford*, 164 Ala. 178, 51 South. 340."

To the like effect was the decision in *Boan v. W. T. Smith L. Co.*, 184 Ala. 535, 63 South. 564.

Did then the agent in charge of the engine see the plaintiff and the frightened, "prancing" mule he was trying to drive or control? In *L. & N. R. R. Co. v. Calvert, as Adm'r*, 172 Ala. 597, 55 South. 812, and in *Herring v. L. & N. R. R. Co.*, 95 Ala. 422, 70 South. 744, on like evidence, it was held to be a question for the jury to decide whether the engineer did actually see the person injured, from the fact that the engineer was looking in the direction of the plaintiff along a straight track or vista, without intervening obstacles, in the daytime, and under such circumstances as that, within the line or scope or range of his vision, he could have readily seen the person or the obstacle in peril.

[Louisville & Nashville R. R. Co. v. Jenkins.]

In the *Calvert Case*, the engineer had testified that he was looking straight up the road and could not see plaintiff's horse, which was to the side of the railroad and approaching the crossing or track. Notwithstanding this denial, the court said: "It is true that the engineer testified that he did not see the horse until about the time of the collision, and, if this was true, there was no subsequent negligence. The engineer said, however, he was looking straight ahead, and it may be that his vision, if looking straight up between the rails, extended no considerable distance outside of the rails; yet it was for the jury to determine how far he could see one approaching the track before he actually got on same.

"There was proof that the right of way was clear, and it was not only a question for the jury, but is a matter of common knowledge, that if one looks a considerable distance ahead, though the eye is aimed at a certain point or object, that the sight will take in to some extent the surrounding or adjacent space, and it was open to the jury to determine that the engineer discovered the horse and buggy approaching the crossing and before the collision."

In *So. Ry. Co. v. Bush*, 122 Ala. 470, 487, 26 South. 168, 173, the court said: "Certainly the facts that the road was straight for a long distance, the view of the track unobstructed, and the engineer was in his seat looking ahead along the track, and there was nothing to prevent him from seeing a person on the track a few hundred feet ahead, are relevant and admissible for the purpose of proving that he did see such person, and may properly be submitted to the jury on this issue; and, while no presumption arises from these facts that the engineer did see the person on the track, yet this may be inferred from these facts by the jury, whose province alone it is to decide the weight to be given to facts legally in evidence and their effect on an issue which they are admitted to prove. A contrary conclusion was apparently reached in *Ga. Pac. Ry. Co. v. Ross*, 100 Ala. 490 [14 South. 282], solely upon the authority of the previous case of *Nave v. A. G. S. R. R. Co.*, 96 Ala. 264 [11 South. 391]."

And in *Peters v. So. Ry. Co.*, 135 Ala. 533, 540, 541, 33 South. 332, 334, the converse of this proposition is stated as follows: "When facts are admitted which conclusively establish another fact, the mere denial by a witness of the existence of the fact so established does not and should not create that material conflict

[Louisville & Nashville R. R. Co. v. Jenkins.]

in evidence which would require a submission of the issue to the jury. In the case of *Artz v. Railroad Co.*, 34 Iowa, 154, 159, in discussing the question before us, it was there said: 'But it is urged by the appellee's counsel that plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or that, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position, is that, the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that at the time he looked and did not see it shine. Could this testimony be true?' "

The *Bush Case* is quoted in *L. & N. R. R. Co. v. Abernathy*, 192 Ala. 629, 69 South. 57, and it was there held that the affirmative charge was properly refused as to the subsequent negligence count. The facts there show that the boy was standing in the center of the track, when the engine, in charge of the fireman and only a short distance behind the boy, was started; that there was no obstruction on the track to prevent the fireman in charge of the engine from seeing the boy; and that the fireman was at the time looking straight ahead, down the track, toward him.

To the like effect are the cases of *Richards v. Sloss-Sheffield S. & I. Co.*, 146 Ala. 254, 258, 41 South. 288; *B. R. L. & P. Co. v. McLain*, 162 Ala. 656, 50 South. 149; *U. S. C. I. P. & F. Co. v. Granger*, 172 Ala. 555, 55 South. 244.

(6) It was a further question for the jury to say whether defendant's agent operating the said engine, if he became aware of plaintiff's immediate presence, with the prancing mule, under the circumstances of the place and of the situation, exercised due care and means not to frighten or to increase the fright of the mule.

The affirmative charge No. 2 should not have been given at defendant's request.

(7) The trial court committed no error in overruling defendant's motion to exclude the evidence of Dr. Hayes.

The hypothetical question to witness Buell was properly permitted to be answered. The plaintiff had testified that steam was coming from the cylinder cocks and the witness had ex-

[Louisville & Nashville R. R. Co. v. Jenkins.]

plained how the steam escaped through the cylinder cocks, etc., and there was evidence from which the jury might infer that the engineer in charge knew of plaintiff's presence and peril.

(9) Charge 1 was properly refused. While it stated the right of the railroad company to operate its engine in the usual manner, and with the usual noise, without liability, yet, if the peril of plaintiff was apparent to defendant's agent in charge of the engine, then he owed to plaintiff at least the duty to shut off the unnecessarily escaping steam at the cylinder cocks, to the end of allaying the fright of the mule traveling in close proximity to the railroad, and to the engine. The witness Buell stated that this could have been instantly done without interfering with the operation of the engine as it proceeded on its way.

In the *Fuller Case*, *supra*, 164 Ala., pages 201, 202, 51 South. 311, cited by appellant, the expression is used: "There is no evidence that unusual or unnecessary noises proceeded from it. * * * Under the circumstances, surely negligence, in respect of fright of the animal, could not, on the facts in this record, be imputed because of the engineman's effort to stop the train. Nor is there any evidence that any act or omission of the engineman contributed to the fright of the animal after her peril from that source became known (if so) to him."

The case of *L. & N. R. R. Co. v. Lee*, *supra*, cited by appellant, is not analogous. That case turned on the question whether the emission of steam was unnecessary, and whether plaintiff failed to discharge his burden of proof.

We find no error in the ruling of the court on the motion for a new trial.

The case is affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

[Ward v. Limblad.]

Ward v. Limblad.**Trover.**

(Decided May 18, 1916. 72 South. 80.)

1. **Trover and Conversion; Evidence.**—The evidence examined and held sufficient to sustain a verdict finding that defendant converted the cow.

2. **Trial; Directing Verdict.**—Where the evidence is open to a reasonable inference of a material fact unfavorable to the right of recovery by the party requesting a directed verdict, the affirmative charge should never be given.

APPEAL from Madison Circuit Court.

Heard before Hon. R. C. BRICKELL.

N. H. Limblad sued R. L. Ward in trover for the conversion of a cow, and there was judgment for plaintiff from which defendant appeals. Affirmed.

(Transferred from Court of Appeals under act creating said court.)

COOPER & COOPER, for appellant. R. E. SMITH, for appellee.

MAYFIELD, J.—The action is in trover, to recover damages for the conversion of a cow. To this count was added a count claiming on an account stated, which latter count, however, need not be noticed, as no question is raised as to it, or as to joinder of counts. The plaintiff's theory of the case was that defendant had wrongfully, if not feloniously, taken plaintiff's cow and converted it to his own use, by slaughtering it and selling the beef in defendant's beef market. It was shown without dispute that defendant was a butcher, and that he made some claim to the cow in question under a mortgage executed by plaintiff's grandson; but there was no claim that the grandson had any right to mortgage plaintiff's cow. Defendant did not, however, attempt to defend by virtue of the mortgage, but he denied converting the cow, or authorizing his butchers to convert it, to his own use.

There was ample evidence to carry the case to the jury, both upon the theory that defendant himself converted the cow, and upon the theory that his agents converted it to the defendant's

[Ward v. Limblad.]

use. Of course, there was no direct evidence that defendant or his agents converted the cow; but there was ample evidence to support the verdict to that effect. The plaintiff testified in part as follows: "I owned a cow on the 6th of September last, and I lost her. Robert Ward stole her. She disappeared the first Sunday night in September last year. Before her disappearance Robert Ward had been to me and asked me if I would sell the cow, and I said I would not. I would not take \$100 for her; she was the finest cow in West Huntsville; she gave five gallons of milk a day and three pounds of butter, was about seven years old, fat, and in good condition, and her market value was about \$75 or \$80. After her disappearance a few days, I went to see Mr. Robert Ward, and asked him if he killed my cow, and he replied that he did not kill her, but he had her killed. I told him I expected he would have to pay for her. Three witnesses heard him. One was Mr. Lawless, one Mr. Hawkins, and the other party I cannot name at this time. He is here, however, in court. The cow has never been paid for by Mr. Ward. I did not sell her to him, and did not give my consent for him to get her. Mr. Ward knew my cow, because I sold him milk and butter, and he knew it was the only cow I had."

Another witness testified as follows: "My name is Tom Lawless. I know Mrs. Limblad and Robert Ward. I was present at the time there was a conversation between Mrs. Limblad and Mr. Ward in regard to killing the cow. I was in Mr. Ward's meat shop one day to get some meat, when Mrs. Limblad walked in right behind me and asked Mr. Ward if he killed her cow. He said, 'No,' he did not kill her cow, but he had her killed; that she was killed in his slaughter pen. Mr. Ward said he did not know it was her cow; that he got it from Garland George. Mrs. Limblad told him that he knew it was not Garland George's cow, because he had been to her to buy the cow, and she would not sell it."

(1, 2) There was other evidence, but we deem it unnecessary to refer to it. That set out above was ample to carry the case to the jury; hence there was no error in declining to give the affirmative charge requested by the defendant. The affirmative charge should never be given where the evidence is open to a reasonable inference of a material fact unfavorable to the right of recovery by the party requesting the charge.—*Carter v. Fulgham*, 134 Ala. 242, 32 South. 684; *L. & N. R. R. Co. v. Lan-*

[Birmingham R. L. & P. Co. v. Sprague.]

caster, 121 Ala. 471, 25 South. 733; *Ala. Co. v. Slaton*, 120 Ala. 259, 24 South. 720; *Hall v. Posey*, 79 Ala. 84; 5 Mayf. Dig. 150. The general affirmative charge should never be given where there is conflict in the evidence as to the issue to be tried.—*Garren v. Fields*, 131 Ala. 305, 30 South. 775; 5 Mayf. Dig. 150.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Birmingham R. L. & P. Co. v. Sprague.

Damages to Automobile.

(Decided May 11, 1916. 72 South. 96.)

1. **Street Railways; Injuries on Track; Jury Question.**—Where the action was for damages to an automobile, and the count of the complaint ascribed its injuries to simple negligence of the operators of defendant's street cars, after discovery of the perilous situation of the automobile near the track ahead of the car, the question of defendant's negligence is for the jury under the evidence in this case.

2. **Appeal and Error; Verdict; Conclusiveness.**—Where a verdict depends upon the credence given by the jury to the witnesses examined, such verdict cannot be held to be contrary to the evidence.

3. **Damages; Injury to Automobile.**—Where there was no evidence as to the value of the loss of the use of an automobile, the measure of damages for its injury was the difference in its value just before and just after the injury.

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Action by J. M. Sprague against the Birmingham Railway, Light & Power Company, for damages for injury to his automobile. Judgment for plaintiff and defendant appeals. Affirmed.

(Transferred from Court of Appeals under act creating said court.)

TILLMAN, BRADLEY & MORROW, and E. CRAMTON HARRIS, for appellant. PERCY, BENNERS & BURR, for appellee.

MCCLELLAN, J.—The plaintiff (appellee) had judgment against the defendant (appellant) for damage to plaintiff's auto-

[Birmingham R. L. & P. Co. v. Sprague.]

mobile resulting from the alleged negligence of the defendant's employees in operating a street car over a public thoroughfare in the city of Birmingham. The case went to the jury on the issues made by the averments of the third and fifth counts of the complaint and by a general traverse thereof and pleas of contributory negligence. The third count ascribed the injury (not the destruction) of the machine to simple, initial negligence of the operative of the street car; and the fifth count ascribed the injury to the machine to simple negligence of the operative after discovery of the perilous situation of the machine near the track ahead of the moving street car.

(1, 2) The issues made by the averments of the third and fifth counts were, under the evidence, plainly ones to be submitted to the jury for decision. As to the fifth count, there was evidence tending to show that the motorman saw the perilous position of the auto, near the track, before the approaching street car, and that at such distance from it as that if the due care and prudence the law exacts of one in the motorman's station had been observed the motorman would have seen the improbability, if not impossibility, of the machine's being removed from the zone of danger, and with the exercise of due diligence could have averted the collision of his street car with the machine. That the issues tendered by the fifth count were for the jury is not debatable under the evidence shown by this record. In reference to the argument for error in overruling the motion for a new trial on the grounds that the verdict was contrary to the evidence, and that the verdict is excessive, it may be said (as to the former) that whether the verdict was well rendered depended upon the credence given by the jury, in the exercise of its peculiar function in that regard, to the witnesses testifying to states of facts and circumstances surrounding the event, and, if the jury accepted the view tending to liability under the fifth count, it is manifest that the conclusion expressed in the verdict cannot be held to be ill founded (*Cobb v. Malone*, 92 Ala. 630, 9 South. 738); and, as to latter, there was evidence that, if believed by the jury, fully justified the amount of damages, \$150, fixed in the verdict.

(3) The court refused the request of the defendant for this special instruction: "If you are reasonably satisfied from the evidence that the plaintiff is entitled to recover, you can award him only the cost of repairs."

[Birmingham R. L. & P. Co. v. Sprague.]

Since there was no evidence of the value of the loss of use of the machine for a definite, appreciable period, it is insisted for appellant that the measure of damages stated in the quoted instruction was the exclusive rule that should have governed the recovery sought in this action. There was competent evidence tending to fix the value of the machine just before and just after the injury; and the refusal by the trial court of the quoted instruction was due, doubtless, to the conclusion that the proper measure of damages was the difference in the value of the machine just before and just after the injury. That is the general rule where a chattel has been injured (not destroyed) by the wrongful act of another.—2 Sedg. on Dam. § 435; *Krebs Mfg. Co. v. Brown*, 108 Ala. 508, 18 South. 659, 54 Am. St. Rep. 188; *L. & N. R. R. Co. v. Mertz*, 149 Ala. 561, 564, 43 South. 7; *Ballanger v. Shumate*, 10 Ala. App. 329, 65 South. 416. There is nothing in the record to exempt the rights of the parties from the application of the general rule. The pertinent statement in *L. & N. R. R. Co. v. Mertz*, *supra*, is as follows: "The court also charged the jury that, "if the plaintiffs were entitled to recover, then they were entitled to recover the value of whatever it cost to put the wagon in proper repair, to put it in the same condition as before.' This was erroneous. The measure of damages would be, not what it actually cost, but what it would reasonably cost to put the property in such condition as it was before, or the difference in the value of the property before and after the injury."

The court, it will be noted, set down the general rule, applicable in this instance, as the alternative of the different rule whereby, in a proper case, the measure of damages is the reasonable cost of repair "to put the property in such condition as it was before;" both rules being alternatively serviceable, in proper circumstances, to effect the law's purpose to fairly compensate for the damnifying result of the wrong committed. There was evidence in this case tending to show an effort to repair; but there was also evidence that the machine, even after the repairs had been made, was not in as good condition for service as it was before. It is readily conceivable that machinery may be repaired with all the diligence and care the injured party should employ to reduce the damage (*Sou. Hdw. Co. v. Standard Equipment Co.*, 158 Ala. 596, 601, 602, 48 South. 357), and yet the machinery may not be in the "condition it was before." Under the evidence here, no court could soundly say that the machine

[*Martin v. Cannon, et al.*]

was or could have been completely restored to its former condition by repair. Indeed, the testimony indicated was to the effect that the repair made did not restore the machine to its former condition. Whether the repairs made were efficient to completely restore the machine to its former condition could not be affirmed either way, as a matter of law.

There is no merit in the errors assigned. The judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Martin v. Cannon, et al.

Partition.

(Decided May 18, 1916. 71 South. 996.)

1. **Pleading; Construction; Demurrer.**—When attacked by demurrer a pleading is construed most strongly against the pleader.

2. **Partition; Bill; Requisite.**—A bill for the sale of realty and a distribution of the proceeds, which alleges that respondent owned an undivided three-fourths interest, and that the three complainants owned a one-fourth interest, but not averring the respective interests of complainants, was defective as the court could not know how to distribute the proceeds, as no intendment could be indulged that they owned the one-quarter interest equally.

APPEAL from Cullman Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by A. W. Cannon and others, against W. G. Martin, for the sale of real estate and the distribution of proceeds. Decree for complainants overruling demurrer to the bill and respondent appeals. Reversed, decree rendered sustaining the demurrer, and the cause remanded with leave to amend.

F. E. St. JOHN, for appellant. A. A. GRIFFITH, for appellee.

ANDERSON, C. J.—(1, 2) The bill in this case seeks a sale of certain real estate and a distribution of the proceeds between the owners thereof. The bill alleges that the respondent owns an undivided three-fourths interest in the land, and that the

[Martin v. Cannon, et al.]

three complainants own a one-fourth interest in said land. The bill does not aver, however, the respective interests of the complainants in and to the said undivided one-fourth interest, and, from aught that appears, their respective interests may be different and unequal, and pleading, when assailed upon demurrer, must be construed more strongly against the pleader, and this identical point was made by ground 4 of the respondent's demurrer. From the averments of this bill, the court would not know how to distribute the proceeds of the sale as between the three complainants, as it does not show that they own equally the undivided one-fourth interest, and inferences and intendments that they do cannot be indulged in considering a demurrer to the bill. The case of *Hillens v. Brinsfield*, 108 Ala. 605, 18 South. 604, cited and relied upon by counsel in support of the sufficiency of the bill does hold that section 5205 of the Code of 1907, as to the contents of a petition for the division or partition of land in kind, does not apply to proceedings under subsequent sections for the sale of land for division, but we think that said case holds and directs that a petition or bill for a sale for distribution must set forth the respective interests of the owners of the land. We quote from the opinion:

"In all judicial proceedings, the essential facts constituting the cause of action must appear, in a way that an issue can be formed upon them, and so that the court can proceed, in an intelligent manner, to observe and enforce the rights of the parties. When we read and analyze the several provisions of the several sections of this system, we see plainly that no case would be stated upon which the court could intelligently act, which failed to show that there was a joint or common property, and what that property was; that there were joint or common owners thereof, who they were, and *their respective interests therein*."

Again it was said in said opinion:

"We must not, however, be understood as holding that the statutory system for the sale of property for distribution, as embodied in sections 3253 to 3259, inclusive, *supra*, does not require the petition for a sale to set forth a proper description of the property to be sold, and to make the joint tenants, or tenants in common, parties thereto, *showing their respective interests in the property*." (Italics supplied.)

We think that good pleading requires that the petition or bill should set forth the interest of each joint owner, and not leave it

[House, et al. v. Davis, et al.]

to conjecture or inference, which the present bill fails to do, and which said infirmity was pointed out by the respondent's demurrer, and the chancery court erred in overruling said demurrer.

The decree of the chancery court is reversed, and one is here rendered sustaining the demurrer, and the cause is remanded, and the complainants are given 30 days within which to amend said bill.

Reversed, rendered, and remanded.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

House, et al. v. Davis, et al.

Bill to Enforce Vendor's Lien Subject to Mortgage.

(Decided April 18, 1916. 71 South. 685.)

1. **Vendor and Purchaser; Lien; Bill to Enforce.**—Since the proceedings would not affect his title, the mortgagee was not a necessary party to a bill to perfect and enforce a vendors' lien subject to his mortgage.

2. **Same; Bona Fide; Rights of.**—A bona fide purchaser for value and without notice will be protected pro tanto to the extent that he pays before notice of a latent equity.

3. **Same; Lien; Bill.**—Where the bill sought the perfection of a vendor's lien, it was not demurrable though it showed that complainant's vendee had sold the land to another, where it did not show or admit that the last grantee was a bona fide purchaser for value, and without notice, or that he had paid any of the consideration, or had assumed irrevocable obligation.

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Bill by C. M. Davis and another, against F. M. House and others, to enforce a vendor's lien. From a decree overruling demurrers to the bill respondents appeal. Affirmed.

SAMUEL W. TATE, for appellant. BLACKWELL, AGEE & BIRR, for appellee.

MCCLELLAN, J.—(1) The appellees filed the bill against the appellants to have declared and enforced a vendor's lien, sub-

[Walker, Supt. v. Mutual Alliance Trust Co.]

ject to prior mortgage to Annie G. Luttrell on the land. Obviously, the mortgagee is not a necessary party to the cause set forth in, and the relief sought by, this bill. If the court should grant the relief sought, and a sale of the land should be appropriately ordered and effected, the purchaser at the sale would acquire no right or title superior, but subordinate, to the lien of the mortgagee.

(2, 3) It is established in this state that an innocent, bona fide purchaser of land will be protected to the extent pro tanto he pays before notice of a latent equity.—*Florence Mach. Co. v. Zeigler*, 58 Ala. 221, 224, 225; *Craft v. Russell*, 67 Ala. 9, 12. Appellees' vendee, House, sold and conveyed the land to Peters "at and for the sum of \$1,000.00, payable as follows: \$400.00 at one year after date (about January 1, 1916); \$400.00 at two years after date; and \$200.00 at three years after date." The bill does not show or admit that Peters was bona fide purchaser for value and without notice. According to the dealing between House and Peters, disclosed by the averments of the bill, Peters had paid or parted with nothing of value at the time the bill was filed, viz., July 5, 1915. Whether Peters executed or assumed irrevocable obligations in or about his purchase from House before notice of the equity asserted by appellees is a question not capable of being raised or decided at this stage without assuming the existence of allegations not present in this bill.

The court correctly overruled the demurrer.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Walker, Supt. v. Mutual Alliance Trust Co.

Petition for Intervention, and Other Relief.

(Decided April 20, 1916. 71 South. 697.)

1. **Pleading; Construction; Demurrer.**—When attacked by demurrer facts stated in a petition must be treated as true.

2. **Banks and Banking; Administration by State Department; Rights of Creditors.**—Where a bank was unable to meet its engagements promptly, if not actually insolvent, and was taken charge of through the agency of the State Superintendent of Banks vested by statute with the powers and duties to such end, by bill in chancery, and such superintendent as agent, or quasi-

[Walker, Supt. v. Mutual Alliance Trust Co.]

trustee or receiver, settled an indebtedness to the bank by accepting from the debtor conveyance of a lot of land, and such settlement was ratified by the court, the court, on the petition of a creditor of the bank secured by notes and mortgages held by the bank against its debtor might protect the interest of all the parties by enforcing the creditor's lien at least to the amount of the debt for which it held the collateral, and which the bank owed it, or to its aliquot part thereof, among other creditors having a lien, since the law would imply a promise and a duty to so account.

3. **Same; Ratification by Creditors.**—The filing of a petition on the part of a creditor of the bank seeking to enforce his lien as in this instance was a ratification by the creditor of the settlement made by the superintendent with the debtor of the bank.

4. **Same; Claim of Creditors; Venue.**—Under Acts 1911, p. 83, the proceedings here attempted may be maintained against the superintendent in his representative capacity in the county in which he was administering the trust, and in the same court in which he was acting as quasi-receiver.

5. **Same; Compromise of Debt; Validity.**—Having acted in the matter of compromising the debt to the bank, and his action having been approved by the court and the parties in interest, the superintendent of banks could not set up the invalidity of his act as an answer to this petition.

APPEAL from Geneva Chancery Court.

Heard before Hon. M. R. CHAPMAN.

A. E. Walker, as State Superintendent of Banks, assumed control of the business of the Bank of Geneva, and made certain settlements with the debtors of the bank, and was proceeding to enforce his administration in the chancery court, whereupon the Mutual Alliance Trust Company filed a petition in said court seeking to enforce a lien on property received by Walker as Superintendent, in settlement of an indebtedness to the bank claiming to hold as collateral the notes and mortgages given by such debtors to the bank, and by the bank pledged to them as security for a loan. From a decree overruling demurrer to the petition, the Superintendent appeals. Affirmed.

W. O. MULKY, for appellant. C. D. CARMICHEAL, for appellee.

MAYFIELD, J.—The Bank of Geneva is an Alabama corporation, engaged in the banking business at Geneva, Ala. In time it became heavily indebted, and not able to meet its engagements and duties promptly, if not actually insolvent. Its business was, on this account, taken charge and control of by the chancery court of Geneva county, by and through the agency of appellant, who is the superintendent of banks of Alabama, and upon whom is conferred powers and imposed duties to this end,

[Walker, Supt. v. Mutual Alliance Trust Co.]

by virtue of a statute. Appellee was among the large creditors of this bank, the bank securing its indebtedness to appellee by depositing with it notes and mortgages which the bank held against its (the bank's) debtors, including those evidencing a debt owing it by K. M. Clark and McDuffie & Clark. Appellant, in his official capacity, and as agent or quasi trustee or receiver of the court, compromised or settled the indebtedness due the Bank of Geneva from K. M. Clark; and in consideration therefor, and in satisfaction of the indebtedness due the bank, accepted a conveyance of a lot of land from the debtors to the creditor, or to appellant in his representative capacity. This settlement, whether expressly authorized by the court or the law, was ratified by the court; and on the filing of this bill or petition it was ratified by all who had a right to complain. The appellee bank filed a petition in the chancery court of Geneva county, which was administering the trust, asking that the appellant, as superintendent of banks of Alabama and as quasi trustee or receiver of the funds or business of the Bank of Geneva, be made a party to the proceedings, and that the chancery court assume jurisdiction of the petition and declare and enforce a lien in favor of petitioner upon certain property received from McDuffie & Clark, or the Clarks, in settlement of debts due to the Bank of Geneva, upon the strength of the notes held as collateral to secure the debt which the Bank of Geneva owed petitioner. Appellant demurred to the petition or bill, assigning various grounds, including a want of equity in the proceedings. The chancellor overruled appellant's demurrer, and from the decree appellant prosecutes this appeal.

(1-3) The petition or bill, whatever it may be called, seems to us on its face to contain much equity, and asks that nothing be done which is not equitable. Moreover, we know of no law, statutory, common, or other, that stands in the way of a court of equity's assuming jurisdiction and affording relief, if the facts stated in the petition are true—and on demurrer, of course, they must be treated as true. The chancery court of Geneva county is shown to be administering the trust, and appellant and his agents are agencies of the court and the law, in the nature of trustees or receivers for the court; and the funds, including the lands in question acquired from the debtors of the bank, are for the benefit of the creditor of the bank; and if one of the debts so settled by the conveyance of lands was the debt which appellee

[Walker, Supt. v. Mutual Alliance Trust Co.]

held the collateral to secure, it is entitled to a lien, at least to the amount of the debt for which it held the collateral and which the Bank of Geneva owed it, or certainly to its aliquot part thereof, among other creditors having a lien, if such there be.

There is no attempt, so far, to hold appellant liable personally or officially, except in so far as he is a quasi trustee or receiver of the funds of the Bank of Geneva, the affairs of which are being administered in the chancery court of Geneva county. The court can surely protect the interests of all parties concerned, and no injustice or wrong will be done any person or corporation.—34 Cyc. 420, 507.

It is insisted by appellant that he, as bank superintendent, had no knowledge or notice of appellee's claim when he made the settlement with McDuffie & Clark, or the Clarks, and acquired the lands in settlement of the debts which they owed the Bank of Geneva. We are not prepared to say that the notice to him of appellee's claim or right was necessary to the relief prayed; but, if so, the petition in terms alleges that he did have such notice, and this hearing is on demurrer.

It is also claimed by appellant that the settlement was not made for the benefit of appellee, and that no promise was made to account to appellee. If the facts alleged are true, it required no express promise; the law would imply a promise, and impose a duty, to so account.

It is also insisted that appellee did not authorize the settlement, and has not ratified it. The answer to this contention is that this proceeding on the part of the appellee is a ratification thereof.

If the land had been converted into money, our authorities hold that appellee might maintain assumpsit under the facts set forth in the petition. See *Potts & Potts v. Bank*, 102 Ala. 286, 288, 14 South. 663, which collects the authorities. As the lands are not yet converted into money, and the trust is yet being administered by the chancery court, that court, of course, has jurisdiction to give full and adequate relief.—*Henry v. Henry*, 103 Ala. 595, 15 South. 916.

(4) There can be no doubt about the right to maintain this proceeding against appellant, in his representative capacity, in Geneva county, where he is administering the trust and in the same court in which he is acting as quasi receiver.—Acts 1911, p. 83; *Henry v. Henry*, *supra*.

[Moore, et al. v. Altom.]

What was said in several recent cases by this court is applicable here. Appellant is only proceeded against as a quasi trustee or receiver of the court administering the trust estate, and there is no question that his activities can be controlled within proper bounds by the court, nor that with the court's consent he may be proceeded against.—*Coffee v. Gay*, 191 Ala. 137, 67 South. 681, L. R. A. 1915D, 802; *Cobbs v. Vizard Co.*, 182 Ala. 372, 62 South. 730, Ann. Cas. 1915D, 801.

(5) The receiver having acted in the matter, and his action being approved by the court and the parties interested, he cannot now set up the invalidity of his acts.—34 Cyc. 411.

It follows that the decree appealed from will be affirmed.
Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Moore, et al. v. Altom.

Bill to Declare Deed Fraudulent.

(Decided April 16, 1916. 71 South. 681.)

1. **Fraudulent Conveyance; Bill; Parties.**—In a bill to set aside a fraudulent conveyance, one who has joined with respondent in the execution of a note on which complainant is a creditor, and whose liability is both joint and several, is not a necessary party.

2. **Same; Validity as Between Original Parties.**—A conveyance claimed to be fraudulent by a creditor of the grantor cannot for that reason be annulled as between the parties to it.

3. **Same; Disposition of Proceeds; Surplus.**—Where land is conveyed in fraud of creditors, and is sold to satisfy their claim, the remainder of the fund produced by the sale goes to the grantee in the fraudulent conveyance or those claiming under him.

4. **Same; Parties; Wife of Grantor.**—It is not necessary to join as respondent to a bill to set aside a conveyance as fraudulent, the wife of the grantor who is charged with no fraud, although she joined in the conveyance.

5. **Same; Pleading; Bill; Presentation of Note.**—In a bill to set aside a fraudulent conveyance in order to enforce a note, it need not be alleged that such note was presented for payment at the time and place where payable, nor to deny that funds awaited it there, since this is defensive matter.

6. **Bills and Notes; Money at Place of Payment.**—If money for the payment of a note awaits the holder at the time and place for payment, this is the equivalent of a tender under § 5025, Code 1907.

[Moore, et al. v. Altom.]

7. **Same; Presentation; Necessity.**—If the holder of a note does not present his note for payment where payment is tendered, he does not thereby forfeit his debt, but only the cost of collecting it elsewhere.

8. **Fraudulent Conveyances; Remedies; Order of Sale.**—If the complainant is entitled to a decree on the merits, and it appears that the land may be sold in parcels without jeopardizing the full satisfaction of complainant's demand, and that such course may avoid an unnecessary sacrifice of the land, the court may order the sale in parcels in its discretion.

APPEAL from Jackson Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by J. B. Altom against B. B. Moore, and others, to declare a deed fraudulent and void as to creditors, and to subject the land therein to sale for the satisfaction of the grantor's debt. From a decree for complainant respondents appeal. Affirmed.

LAWRENCE E. BROWN, for appellant. BOULDIN & WIMBERLY, for appellee.

SAYRE, J.—After the decree overruling the general demurrer had been affirmed in this court (*Moore v. Altom*, 192 Ala. 261, 68 South. 326) complainant (appellee) eliminated from his bill that alternative aspect of it which sought to enforce a vendor's lien, and further amended by adding to the bill in its other aspect, seeking to set aside a conveyance as fraudulent, an averment to the effect that the grantee defendant Sherwood was a party to the fraud.

(1) Smith had no interest in the lands in question; he took nothing by the conveyance complained of. He joined Moore in the execution of the note that made complainant a creditor; but this liability was several as well as joint. We conceive no reason why he should be made a party to complainant's bill to collect his debt from Moore by having the court decree Sherwood a trustee in invitum of the land conveyed to him in fraud of complainant's right as a creditor.

(2,4) As between the parties to it the conveyance in controversy cannot be annulled. After the complainant shall have been satisfied, the remainder of any fund to be produced by the decree, if the decree results in a sale, will go to the fraudulent grantee or those claiming under him.—*Davis v. Stovall*, 185 Ala. 174, 64 South. 586. It was not necessary to make Mrs. Moore, who joined her husband in the conveyance, but who is charged with no fraud, a party defendant to the bill.—*Williams v. Spragins*, 102 Ala. 424, 15 South. 247.

[Yarbrough v. Stewart, et al.]

(5-7) Appellant insists that no default in the payment of the note is shown, for the reason that it was payable at the Tennessee Valley Bank, and the bill contains no averment that the note was presented for payment at the time and place when and where it was made payable, nor any denial that funds awaited the note at the bank. This is defensive matter. If money for its payment awaited the complainant at the time and place appointed for the payment of the note, that was the equivalent of a tender, but does not deprive complainant of his right to proceed in this bill. If complainant was at fault in presenting his note for payment, he did not thereby forfeit his money, but only the cost of collecting it elsewhere.—Code, § 5025. If an indorser were involved, the rule as to him would be different.

(8) Complainant was under no duty to point out how the land conveyed could best be sold to the advantage of defendant. If the averments of the bill shall be established, defendant has no rights in the land as against complainant. The court, in the event of a decree for complainant on the merits, if it shall appear that the land may be sold in parcels without jeopardizing the full satisfaction of complainant's demand, and that such course may avoid an unnecessary sacrifice of the land to defendant, may, in its discretion, order a sale in parcels. That matter will be left with the chancellor.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Yarbrough v. Stewart, et al.

Bill to Enjoin Collection of Judgment.

(Decided April 20, 1916. Rehearing denied June 1, 1916.
71 South. 986.)

Logs and Logging; Sale of Timber; Turpentine.—The right of turpentine is not embraced in the right to cut, remove or manufacture timber.

APPEAL from Autauga Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by E. E. Yarbrough against T. H. Stewart and others, to enjoin the collection of a judgment for trespass upon land. From

[*Yarbrough v. Stewart, et al.*]

a degree sustaining demurrers to the bill, complainants appeal. See in this connection *Yarbrough v. Stewart*, 191 Ala. 454, 67 South. 989.

W. A. GUNTER, and C. E. O. TIMMERMAN, for appellant.
EUGENE BALLARD, for appellee.

SOMERVILLE, J.—The bill of complaint seeks to enjoin the respondents from the collection of a judgment for damages “for trespass upon land,” recovered by them against complainant, and which was affirmed on appeal to this court.—*Yarbrough v. Stewart*, 191 Ala. 454, 67 South. 989.

The basis shown for this relief is that respondents, as owners of the land in question, sold the merchantable timber thereon, with the right to enter, and cut, remove, and manufacture said timber for any lawful purpose, that these rights passed by mesne conveyances to one Gibbons, whose title and rights were, however, equitable only, by reason of a misdescription of the lands in one of the intermediate deeds, and that Gibbons leased to complainant “the turpentine rights” on said lands. The theory of the bill is that complainant’s turpentine lease from Gibbons would have been a complete defense to the trespass suit but for the defect in Gibbons’ legal title and rights to the timber; the equity being unavailable in such an action at law; and complainant now asserts in equity his equitable rights to defeat an inequitable judgment.

Conceding that Gibbons is invested with a perfect legal title to the timber and all the incidental rights originally granted by respondents to his predecessor, the bill of complaint is nevertheless without equity. Gibbons himself had no right to use the land for the purpose of taking turpentine from the trees thereon, and he could not authorize another to do what he could not do himself; for the right of “turpentering” is not embraced in the right to cut, remove, or manufacture timber.—*Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 South. 886; *Yarbrough v. Stewart*, 191 Ala. 454, 67 South. 989.

It is urged that, even so, complainant’s entry upon the land was not unlawful, since he may be regarded as the agent or servant of Gibbons with respect to such entry; and hence the trespass suit being for an unlawful entry, the establishment of Gibbons’ legal rights by a corrected deed would render complainant’s entry lawful, and would have defeated that suit.

[Mitchell, et al. v. Cudd.]

There are two sufficient answers to this contention: (1) The bill does not show that complainant entered as the agent or servant of Gibbons, nor with respect to any purpose within the lawful rights of Gibbons in the premises, and hence does not bring complainant within the protection of that authority.—*Yarbrough v. Stewart*, 191 Ala. 454, 67 South. 989. (2) The bill does not show that the trespass suit was only for an unlawful entry upon the land. Non constat, but it may have been for injuries to the grass, shrubbery, or small trees not embraced in the original grant of merchantable timber.

The demurrers to the bill of complaint were properly sustained, and the decree will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Mitchell, et al. v. Cudd.

Bill to Foreclose, and Reform.

(Decided April 13, 1916. 71 South. 660.)

1. **Equity; Pleading; Multifariousness.**—Where the bill sought foreclosure of two mortgages on real estate, one executed by J. and others, and the other executed later by M. and to reform certain features of the description in the mortgage, and as amended sought the cancellation of a conveyance by J. and M. to a son of M., as a condition to the enforcement of the mortgages, the purpose of the bill was single—the enforcement of complainant's lien, and was not multifarious; it not being essential in such cases that every respondent have an interest in or concern for all matters or phases of the controversy.

2. **Cancellation of Instruments; Parties; Respondent.**—Upon a bill to foreclose and to cancel, the grantee in the conveyance sought to be cancelled was a necessary party respondent, since complainant's rights could not be satisfactorily and completely determined without such party.

APPEAL from Morgan Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by J. J. Cudd against Harry Mitchell and others, to foreclose certain mortgages on real estate, to reform the description in said mortgages, and to cancel a certain deed. Decree overruling demurrer to the bill and respondents appeal. Affirmed.

[Mitchell, et al. v. Cudd.]

P. M. BRINDLEY, and E. M. RUSSELL, for appellant. E. W. GODBEY, for appellee.

McCLELLAN, J.—In the amended bill the appellee is the complainant, and Frank O. Mitchell and others are the respondents. The dominant purpose of the bill is to foreclose two mortgages on real estate, one executed to complainant, on September 4, 1907, by M. A., John, Harry, Mollie, and G. A. Mitchell, and the other, executed to complainant, on June 26, 1911, by M. A. Mitchell, and to reform specified features of the descriptions of lands in the mortgages. Frank O. Mitchell is the son and heir at law of M. A. and John Mitchell, now deceased. An exhibit to the bill is a copy of a conveyance executed on August 15, 1905, by M. A. and John Mitchell to Frank O. Mitchell. The amended bill seeks, among other things, the cancellation of this conveyance, which, if unavoids, would render ineffectual the complainant's mortgages on the land described in the conveyance to Frank O. Mitchell. That the amended bill, in its general theory, possesses equity is manifest.

Three questions are discussed in brief for appellants who invoke review of the decree overruling the demurrers. The consideration of the appeal is, of course, confined to these questions:

1. The averments of paragraph 6 of the amended bill fully refute the first contention, viz., that complainant, when he accepted the first or the second mortgage, had actual knowledge of the existence of the deed of August 15, 1905, to Frank O. Mitchell. The allegations of this paragraph affirmatively exclude the notion that complainant had, until after he had accepted the second mortgage (June 26, 1911), knowledge or notice of the existence of the conveyance to Frank O. Mitchell.

(1) 2. The effect of the contention that the bill is multifarious, because it seeks the cancellation of the conveyance of August 15, 1905, to Frank O. Mitchell, is to say that the mortgagee (complainant) must, in a separate cause, invoke the courts to cancel that conveyance. The purpose of the bill is single, viz., enforcement of the complainant's liens; and the removal of obstacles in the way of that relief is but incidental to the major objective. It is not essential, in causes of this character, that every defendant have an interest in, or concern for, all matters or phases of the controversy. The amended bill is not multifarious.—*Ellis v. Vandergrift*, 173 Ala. 142, 154, 155, 55 South.

[Dabbs v. Dabbs.]

781; *Truss v. Miller*, 116 Ala. 494, 505, 22 South. 863; *Bolman v. Lohman*, 74 Ala. 507.

(2) 3. It is obvious that Frank O. Mitchell is a necessary party respondent to the cause. Under the averments of the amended bill, the rights complainant asserts and would have vindicated could not be satisfactorily completely determined without making Frank O. Mitchell a party respondent. The three objections urged against the amended bill on this appeal are without merit.

The decree is affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Dabbs v. Dabbs.

Divorce.

(Decided April 6, 1916. 71 South. 696.)

1. **Divorce; Voluntary Abandonment; Statute.**—Under subdivision 3, § 3799, Code 1907, where the husband compelled the separation by compelling the wife to leave the domicile, taking with her several minor children which she was compelled to raise, there was not a voluntary abandonment; and the fact that many years after he compelled the separation complainant went to the house established by the wife and there remained with her about a month, and then left without any reason given by her, such association with his wife did not exonerate him from the consequences of his previous conduct, and re-establish their relations in such a sense as to render her culpable in any degree.

2. **Same; Abandonment.**—A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him, as by going away from their former residence and leaving her there, and not permitting her to live with him.

3. **Same; Cross Bill; Alimony.**—Where the decree granting the husband a divorce was reversed for a failure to prove the grounds alleged, the dismissal of the original bill did not have the effect to strike down the wife's cross bill seeking permanent alimony upon the contingency that the divorce be granted, but such cross bill will be remanded to enable the cross complainant to amend and proceed as she might be advised, she having been granted the prayer of her bill, and reference ordered to determine the amount to be allowed for alimony, and a reasonable solicitor's fee.

APPEAL from Bessemer City Court.
Heard before Hon. J. C. B. GWIN.

[Dabbs v. Dabbs.]

Bill by W. H. Dabbs against Elizabeth Dabbs for divorce, with cross-bill by respondent, seeking permanent alimony in case the divorce should be granted. Decree for complainant and respondent appeals. Reversed and rendered on original appeal, with dismissal of original bill, and cause remanded on cross appeal.

ESTES, JONES & WELSH, for appellant. PINKNEY SCOTT, for appellee.

MCCLELLAN, J.—(1) Bill by the husband for divorce; the single ground assigned being the wife's "voluntary abandonment" of the husband's "bed and board." The overwhelming weight of the evidence disproves the ground upon which the complainant rests his prayer for a dissolution of the marriage bonds. The conclusion is unescapable that the complainant compelled the wife's departure from his domicile, a departure that included her taking with her the several minor children of the union, and resulted in her unaided rearing of them. Obviously a separation thus enforced by the husband could not be a "voluntary" abandonment within the purview of subdivision 3, § 3793, of the Code.

(2) The complainant went to the place of residence established by the wife, many years after he had compelled her departure from his domicile, and there remained with her about 32 days, and upon the expiration of that period the complainant left the wife's dwelling. From the evidence there can be no doubt that complainant left her dwelling without any reason or excuse therefor, afforded by her conduct, and in the heat of a temper and ill will towards her that had characterized their association before he compelled her departure from his domicile. According to the evidence here presented, it cannot be soundly ruled that his reassociation with his wife, after many years of separation, alone attributable to his very reprehensible treatment of her and of the children of the union—years devoted by her to the unassisted rearing of several of their children—served to exonerate him from the consequences of his previous conduct that compelled her departure from his domicile, and to so re-establish their relation as to render her culpable in any degree, or to justify any suggestion that his leaving her dwelling was or could be the basis of a charge that she then voluntarily abandoned him.

[Dabbs v. Dabbs.]

"A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him as by going off himself from their former residence, leaving her there, and not permitting her to live with him."—*Jones v. Jones*, 95 Ala. 443, 451, 11 South. 11, 13 (18 L. R. A. 95).

The decree, in so far as it dissolves the bonds of matrimony, as prayed in complainant's bill, is reversed, and a decree will be here rendered dismissing his bill.

(3) The cross-bill of the respondent (appellant) sought permanent alimony upon the contingency that the bonds of matrimony should be dissolved as prayed in complainant's bill. The court, following the awarding of the relief sought by complainant's bill, granted the stated prayer of the cross-bill and ordered a reference to the register to ascertain a reasonable sum to be allowed for permanent alimony, as well as to ascertain the amount of a reasonable solicitor's fee for obtaining such alimony as might be awarded. Since alimony may be awarded even though no dissolution of the marital bonds is effected (*Glover v. Glover*, 16 Ala. 440; *Downey v. Downey*, 98 Ala. 373, 13 South. 412, 21 L. R. A. 677), and since the evidence here presents a clear case for the exaction of a reasonable contribution by the complainant (respondent in the cross-bill) to the support of his wife, who, after bearing him 10 children and without his aid rearing several of them, is now well past middle age, we have determined to remand the cause, that the cross-complainant may amend her cross-bill and proceed in the premises as she may be advised; the dismissal of the original bill not operating to strike down the cross-bill, which possessed an independent basis for relief.

The decree is reversed and rendered in part, and the cause is remanded. The cost of the appeal will be taxed against the appellee.

Reversed, rendered, and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

[Farrell v. Farrell.]

Farrell v. Farrell.**Divorce.**

(Decided April 6, 1916. 71 South. 661.)

Divorce; Alimony; Amount.—Where the wife secured a divorce from her husband because of cruelty, although not entirely free from fault herself, and the husband was a strong, healthy man, forty-eight years old, successful in business, with a personal estate of \$5,000.00 or more, an award of \$1,200.00 permanent alimony, with \$100.00 attorney's fees is not excessive.

APPEAL from Madison Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by J. R. Farrell against Lucy Farrell, for divorce, with cross-bill seeking alimony. From the decree granting alimony and attorney's fees, complainant appeals. Affirmed.

DOUGLAS TAYLOR, and CLARENCE L. WATTS, for appellant.
BETTS & BETTS, for appellee.

GARDNER, J.—Appellant filed the original bill in this cause, seeking a decree of divorce from bed and board because of cruelty on the part of his wife, as authorized by Code, § 2809. Appellee made her answer a cross-bill and sought an absolute divorce from the bonds of matrimony on the ground of cruelty. Upon submission of the cause for final decree, the chancellor dismissed the complainant's bill and granted the relief prayed in the cross-bill, thus divorcing the parties absolutely, and awarded to the wife the sum of \$1,200 as permanent alimony and \$100 as her attorney's fee, the amount agreed upon by counsel. In his opinion, which accompanies the decree, the chancellor discusses the evidence in the case, and concluded that: "While the wife may not be entirely free from fault, a consideration of the situation of the parties, the delicate condition of the wife, the health and strength of the husband, and of the acts and conduct of the husband and his children toward his wife, inclines the court to the opinion that the charges of cruelty against the husband by the wife have been made out and that she should be granted relief, notwithstanding her own derelictions."

[Farrell v. Farrell.]

Appellant was a widower 48 years of age at the time of this marriage, the father of six children, five of whom resided with him; and appellee was a widow 31 years of age, the mother of two small children. The record is convincing that it was an ill-starred match. The parties were married in June, 1914, and the original bill in this cause was filed in August, 1915. It would serve no useful purpose to discuss this rather voluminous record, and thus place in permanent form the details of this unfortunate family relation. Suffice is to say the evidence has been given careful consideration, and we are persuaded that the chancellor reached the correct conclusion as summarized in the above-quoted statement from his opinion.

The question of alimony has also been carefully considered, and due consideration given to the fact that from the evidence we find the wife not entirely free from fault.—*Jones v. Jones*, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95. The chancellor in his opinion states as his conclusion that the value of the complainant's personal estate equals or exceeds \$5,000. We are led to the conclusion that this is a rather conservative estimate, and that doubtless its value exceeds that amount. His real estate does not exceed \$500 in value, but he does not appear to be indebted. It further appears from the record as well established that the appellant is a strong and healthy man, industrious, and more or less successful in his business affairs. His earning capacity is to be taken into consideration.—*Johnson v. Johnson*, 195 Ala. 641, 71 South. 415. The exhibit to his testimony, showing his bank account, gives some idea of the volume of business transacted by him, disclosing deposits of \$19,000 in a period of less than one year.

Upon mature consideration, we see no sufficient reason for a modification of the decree of the chancellor with respect to the amount of alimony and the amount of attorney's fee.—*Jeter v. Jeter*, 36 Ala. 401; *Turner v. Turner*, 44 Ala. 438; *King v. King*, 28 Ala. 315; *Sharit v. Sharit*, 112 Ala. 617, 20 South. 954; 1 Rul. Cas. Law, §§ 77, 78. We are therefore of the opinion that the decree of the court below should not be disturbed, and it is accordingly affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

[Todd, et al. v. Interstate Mortgage & Bond Co.]

Todd, et al. v. Interstate Mortgage & Bond Co.

Bill to Require Mortgagor to Affirm or Disaffirm a Sale, and for Foreclosure.

(Decided April 16, 1916. 71 South. 661.)

1. **Dower; Estoppel; Mortgage.**—The widow estopped herself as against the mortgagee to assert dower or quarantine right by joining with the heirs of the deceased husband in the execution of a mortgage on the lands of deceased husband after his death.

2. **Homestead; Estoppel; Mortgage.**—Under § 4191, Code 1907, the widow estopped herself to assert her homestead rights in the property, as against the mortgagee by joining with the heirs of her deceased husband in the execution of the mortgage on the lands after his death.

3. **Equity; Pleading; Construction.**—Where the original bill alleged foreclosure by the mortgagee, and its purchase of the two mortgaged parcels of land en masse, the widow and the heirs of the husband having mortgaged two tracts, one owned by the widow and the other by the heirs, the widow having joined in the mortgage only as surety, and the prayer was that the mortgagors elect whether they would affirm or disaffirm the sale under power, and, in the event of disaffirmance, that the mortgage be foreclosed by appropriate decree, thus conceding the option of the mortgagor to disaffirm, the widow's right to the benefit of a proper foreclosure of the two tracts separately under the decree of the court asserted by cross bill became fixed, and she could not be deprived thereof by the dismissal of the original bill, or its amendment withdrawing the averments of sale en masse, and withdrawing the prayer that the mortgagor be required to elect, and the substitution of a prayer that the sale be confirmed by decree.

4. **Mortgages; Sale; Surety.**—Where a widow joined as surety in a mortgage made by the heirs of her husband, covering two pieces of property, one belonging to the heirs, and the other to the widow, she had the right to have the property of the heirs first sold on foreclosure of the mortgage for relief pro tanto of her own.

5. **Equity; Pleading; Prayer; Decree.**—Where the bill was against the mortgagors, a widow and the heirs of her husband, seeking to require them to elect whether they would affirm or disaffirm a sale under power, and the widow, who was surety for the heirs filed a cross bill which contained a prayer for general relief, but no prayer for relief by sale of the heir's property first for the relief of her own, it was proper for the court, upon suggestion made at bar, or ex mero motu, to decree a sale of the parcels in the order suggested by the fact that the widow was a surety.

6. **Same.**—The fact that a bill in equity contains a prayer for specific relief not authorized by the facts averred does not destroy the equity of the bill where there is a prayer under which relief may be granted.

7. **Estoppel; Judicial Position; Inconsistent Position.**—In order to come within the rule that a party who obtained or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another aspect in a suit founded upon the same subject matter, the

[Todd, et al. v. Interstate Mortgage & Bond Co.]

election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded.

8. **Election of Remedies; Application of Principal.**—A party must have actually at command two inconsistent remedies to make a case for the application of the principle by which a party concludes himself by an election between two remedies.

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

Bill by the Interstate Mortgage & Bond Company against Mary Annie Todd and others, to require respondents to elect whether they would affirm or disaffirm a sale made under power in the foreclosure of a mortgage, and in the event of a disaffirmance that the mortgage be foreclosed by appropriate decree, with cross bill by Mary Annie Todd. From a degree for complainant Mary Annie Todd appeals. Reversed and remanded.

CULLI & MARTIN, for appellant. O. R. HOOD, and E. D. SMITH, for appellee.

SAYRE, J.—R. T. Todd died intestate, seised in fee of a vacant lot on Turrentine avenue in the city of Gadsden, and this was all the real property he owned. His wife, appellant, owned a lot on Fourth street which had been improved by the erection thereon of three apartments. The family occupied a rented house in another part of the city. Intestate left surviving him appellant and six children, his heirs, one of them a minor. There has never been any administration of his estate, nor any assignment of homestead or dower. Shortly after his death, the widow and children, to secure a loan of money to the children, joined in the execution of a mortgage to J. B. Martin. This mortgage covered both the above-mentioned lots. The children erected two houses on the Turrentine avenue lot, and upon their completion the widow occupied, and continues to occupy, one of them as a dwelling, receiving and using the rents from the other for the support and maintenance of herself and family. Four or five years later the widow and her children, all now certainly of age, executed and delivered the mortgage under which appellee claims. This mortgage also covered both pieces of property. The agreement as to facts states that appellant received no part of the proceeds of the mortgage, into which she entered for the sole purpose of securing the loan to her children by pledging her Fourth street property. However, she executed the mortgage and the notes

[Todd, et al. v. Interstate Mortgage & Bond Co.]

thereby secured, assuming on the face of the transaction, and in fact so far as the mortgagee knew, equality of obligation with the heirs, and out of the proceeds the Martin mortgage was paid and discharged. This mortgage of latest execution contained apt words of conveyance and both special and general warranties applicable alike to both properties. Upon default there was a foreclosure under the power contained in the mortgage, and the mortgagee became the purchaser as it had a right to do under the terms of the security. The two properties were exposed for sale and purchased by appellee en masse at and for the sum of the mortgage debt and the expenses of foreclosure, a sum very materially less than the reasonable value of the property at the time. Afterwards appellant surrendered possession of the Fourth street property to appellee, as she had to do in order to retain her statutory right of redemption, but refused to surrender the Turrentine avenue lot, claiming to hold the latter by her right of quarantine and homestead. Thereupon appellee filed its bill, alleging the foreclosure and its purchase en masse, and praying that the mortgagors be required to elect whether they would affirm or disaffirm the sale, and, in the event of a disaffirmance, that its mortgage be foreclosed by appropriate decree pro confesso. Appellant answered, making her answer a cross-bill under the statute, praying that the foreclosure be set aside, that the Fourth street property be sold in separate parcels, that the Turrentine avenue property be set apart to her and her minor child—meaning, of course, the child who was a minor at the time of the father's death—as a homestead, that the last-named property be not sold or partitioned during her life, and for general relief. To this answer, as a cross-bill, a demurrer was sustained. Appellee then amended its bill by withdrawing the averment of a sale en masse and the prayer that defendants be required to elect, and introducing a prayer that the sale under the power be confirmed by decree and appellee let into possession of the Turrentine avenue property. The heirs allowed this amended bill to be taken as confessed; but appellant again answered by cross-bill, to which, as before, the heirs were made parties defendant, renewing substantially the prayer of her former answer. After demurrer sustained to this cross-bill, appellee again amended by averring that appellant had elected to affirm the sale under the power by joining the heirs in an action at law which the plaintiffs there sought to recover an amount alleged to be due to them

[Todd, et al. v. Interstate Mortgage & Bond Co.]

by reason that appellee had bid in the whole property for an amount considerably in excess of the indebtedness secured by the mortgage, which action had been determined in favor of appellee. This, we believe, is a fair summary of the proceedings prior to the submission for final decree. The cause being submitted for decree on the bill and its amendments, the answer, the decrees pro confesso against the heirs, and the agreed statement of facts—which, we may remark, does not seem to have been intended to cover facts shown by the pleadings not to be in dispute—the chancellor confirmed in all respects appellee's right under the foreclosure sale. The widow appeals.

(1, 2) By joining the heirs in the execution of the mortgage to appellee after the death of her husband, appellant estopped herself, as against the mortgagee, to assert either dower or homestead rights in the property. This, under our decisions, is clearly the case so far as the claim of dower or quarantine right is concerned.—*Jones v. Reese*, 65 Ala. 134; *Reeves v. Brooks*, 80 Ala. 26; *Lytle v. Sandefur*, 93 Ala. 396, 9 South. 260. We can perceive no valid reason why the same rule should not be applied to appellant's claim of homestead. One certain conclusive consideration affects the two cases alike. Whatever may have been the case at the time of the execution of the Martin mortgage, when appellee took the mortgage now in question the heirs were all of full age, and they and the widow owned among them the whole fee and were entirely competent to convey it by deed or mortgage. The statute (Code, § 4197) does provide that, where a decedent, at the time of his death, has no homestead exempt to him from levy and sale under process, the widow and minor child, or children, or either, shall be entitled to homestead exemption, or \$2,000 in lieu thereof, out of any real estate owned by him, and that "in no case, and under no circumstances, shall the widow and minor children, or either of them, be deprived of homestead of \$2,000 in lieu thereof if they or either of them apply therefor in manner as herein provided, before final distribution of the decedent's estate." But, as we indicated in *Chamboredon v. Fayet*, 176 Ala. 211, 57 South. 845, the language of this section in its present shape is broader than the true legislative purpose as it is to be learned from other parts of the statutory system of homestead exemptions and the decisions of this court, the true purpose of that part of the section which we have quoted being to deny that the widow or minor children

[Todd, et al. v. Interstate Mortgage & Bond Co.]

may be charged with laches in moving for an assignment of homestead, provided only they move before final distribution of the decedent's estate. It was never intended to lay down the rule that the widow and heirs, all having reached full age and being sui juris, may not, by conveyance and appropriate covenants in which they all freely join for valuable consideration, estop themselves at law as in equity thereafter to claim homestead in the property so conveyed.

(3, 5) The whole equity, then, of the original bill in this cause, the only reason why the remedy by ejectment would have been inadequate, lay in the averment that the separate parcels covered by the mortgage had been sold at foreclosure en masse, the concession by the complainant that this manner of sale left in the mortgagors an option to disaffirm, the prayer that the mortgagors be required to elect whether they would affirm or disaffirm, and, in the event of a disaffirmance, that the mortgage be foreclosed by appropriate decree. By her election to disaffirm, appellant's right to the benefit of a proper foreclosure under a decree of the court became fixed; and, having so elected, she became entitled further, not only to a sale of the property in separate parcels, but to a sale of them in a certain order. By the pleadings and proof it was made to appear that, while appellant was bound to appellee as a principal debtor, as between herself and the heirs she was a surety. On this ground it was due to her that the Turrentine avenue property be first sold for the relief pro tanto of her Fourth street property. These rights having been asserted by way of cross-bill, she could not be deprived of them by a specious amendment nor even by a dismissal of the original bill, and to this extent the cross-bill contained equity. Appellant did not specifically pray for a part of this relief, but her cross-bill contained a prayer for general relief, and upon suggestion made at the bar, or ex mero, it would have been proper for the court to decree a sale of the parcels in order suggested by the fact that appellant was a surety.—*Rosenau v. Powell*, 173 Ala. 123, 55 South. 789.

(6) To a certain extent appellant proceeded upon a different theory, it seems, though she was careful to aver and prove the fact of her suretyship. This appears from the prayer of her cross-bill, which has been stated. But the fact that a bill contains a prayer for specific relief not authorized by the facts averred will not destroy its equity, provided there is a prayer under which relief may be granted.—*Rosenau v. Powell*, *supra*.

[Todd, et al. v. Interstate Mortgage & Bond Co.]

(7, 8) The amendments, whereby appellee first withdrew the prayer of its original bill for an election and then sought to foreclose the election appellant had made in her answer and cross-bill by averring the action at law, should not have been allowed to avail it anything. These amendments, apart from the status of right and equity brought under consideration by appellant's answer and cross-bill, would have left the cause in the attitude of presenting to the court a question of purely legal cognizance. The equity of the bill in its last shape was refuted by the fact that appellant and her co-plaintiffs had taken nothing by their action at law. In *Herman on Estoppel* it is said that: "A party who obtains or defeats a judgment, by pleading or representing a thing or judgment in one aspect, is estopped from giving it another in a suit founded upon the same subject-matter."—Section 165.

To come within this statement of the rule of conclusiveness, the election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded. He must have received some benefit under his election.—*Register v. Carmichael*, 169 Ala. 588, 53 South. 799, 34 L. R. A. (N. S.) 309, and cases there cited. Appellant and her co-plaintiffs in the action at law, which rested necessarily and alone upon the allegation that appellee's bid was in excess of the amount secured by the mortgage, took nothing for the reason, we must assume upon the record, there was no such excess. Plaintiffs in that action were pursuing a will-o'-the-wisp; there was no substance to the right under which they claimed. To make a case for the application of the principle by which a party concludes himself by an election between remedies, the party must have actually at command two inconsistent remedies.—*Calhoun County v. Art Metal Construction Co.*, 152 Ala. 607, 44 South. 876; *Southern Railway Co. v. City of Attalla*, 147 Ala. 653, 41 South. 664. In *American Freehold Land Mortgage Co. v. Pollard*, 120 Ala. 1, 24 South. 736, cited to this point by appellee, the mortgagee had bid in the property at its foreclosure sale at a price several thousand dollars in excess of the debt secured, and the ruling was that the mortgagor could not be heard to claim the excess while seeking to defeat the security. And in the same case, reported in 127 Ala. 227, 29 South. 598, where it appeared that the mortgagor, in answer to the mortgagee's original bill, had elected to affirm under the terms then proposed, and afterwards

[Chambless v. Jones.]

the bill was amended to change the terms, it was held that the amendment set the mortgagor's election at large. In the same case it was held that the filing of the bill revived the right of election which otherwise would have been lost to the mortgagor; this upon the principle that the mortgagee, though in possession for a length of time that would have barred a bill by the mortgagor to avoid the sale, treated the mortgage as merely a subsisting security by filing its bill, such an act being entirely inconsistent with any pretension on its part that its possession had ripened into title. The principle brought into view by the cases to which we have referred lead to the conclusion that, whatever effect might otherwise have been attributed to appellant's unsuccessful lawsuit, the filing of the original bill in this cause gave appellant a right of election to affirm or disaffirm the voidable foreclosure, a right of which she could not be deprived after she had elected by answer and cross-bill to disaffirm and prayed for relief that became appropriate in that event.

The decree was affected with error. To the end that appellant may have her election to disaffirm the foreclosure sale made effectual and that the mortgage may be properly foreclosed by decree under the pleadings to be recast to develop the true equities of the cause, the court making such order, if any, in respect to the sale by subdivisions of the two parcels as may seem best in the circumstances, the decree will be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Chambless v. Jones.

Bill to Define Boundaries.

(Decided May 11, 1916. 71 South. 987.)

1. **Boundaries; Establishment; Acquiescence.**—Where, after a survey, and with the knowledge and consent of the adjoining owner, a lot owner moved the boundary fence between the two lots to conform with the survey, the acquiescence of the adjoining owner in the survey *prima facie* indicated its validity, and raised a presumption of its correctness.

2. **Same; Evidence.**—The evidence examined and held to show that the boundary line was as claimed by the complainant.

[Chambless v. Jones.]

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by L. A. Chambless against T. A. Jones to enjoin a trespass and to define a boundary line. From a decree dismissing her bill complainant appeals. Reversed and rendered.

THOMAS J. WINGFIELD, for appellant. GASTON & DRENNEN, for appellee.

GARDNER, J.—Appellant, the owner of “lot 3, block 8 A. East Lake Land Company survey,” in Birmingham, Ala., filed this bill against the appellee, who is the owner of “lot 4, block 8 A. East Lake Land Company survey,” which lies adjacent to the lot owned by appellant. The bill alleges that the respondent has placed on said lot a building in such manner that the eaves of same project over lot 3, owned by complainant, and that the respondent has placed on the lot certain pipes connecting the said building with a sewer which passes in front of said lots; that complainant has never given respondent or any one else any right whatever to place said building on her premises or run any pipes through the same, but on the contrary has demanded that the respondent remove that part of the building on or over her premises and remove the pipes from her property. The prayer of the bill is for a mandatory injunction requiring this to be done.

Respondent answered the bill, denying the material averments thereof in respect to any of his property being on or over the premises of complainant, and setting up the statute of limitations of 10 years and adverse possession for a sufficient length of time to perfect his title up to the dividing line fence which was standing on the property at the time he purchased it. Upon submission of the cause for final decree on pleadings and proof, the chancellor denied complainant any relief and dismissed her bill. The equity of the bill is not brought into question on this appeal, the result of which rests upon the solution of a question of fact as to the true location of the boundary line between these parties. We need not discuss that phase of the answer setting up the question of the statute of limitations or that of adverse possession, as it is too clear from the evidence in the case that neither of these defenses is sustained by the proof. Nor does it appear to be insisted to the contrary by counsel for appellee.

[Chambless v. Jones.]

(1) Appellee purchased his lot a short while before appellant bought hers, and there was a fence erected dividing the two lots at the time of the purchase. It is quite clear that appellee was under the impression that the fence was on the proper and correct dividing line between the lots, but it appears, also, that within a short time after the purchase notice was brought to him that appellant questioned the correctness of the same, and in 1908 cautioned him in regard to the laying of pipes, that they be not placed on her premises. In 1911 appellant had the property surveyed by one Meade. At that time she seems to have had the matter placed in the hands of her attorney. The survey by Meade, as shown by his testimony, established that the fence was not on the line, but was over on the property of appellant. This survey fixed the dividing line some ten inches at the front of the property toward the premises of respondent. Meade, who was a civil engineer of 17 years' experience, testified to the correctness of the line as established by him. He took as his starting point a certain stone monument in the center of Seventy-Fifth street, placed ~~there~~ to indicate its center, and another point was an iron pipe on the west side of Seventy-Fifth street, placed to indicate a lot corner. His survey corresponded with the curb lines on the streets and it went by the map of East Lake, furnished by the East Lake Land Company, from which this property was purchased. Respondent's surveyor, Mr. Truss, testified that the stone monument was placed by him at the time he was establishing the center of the streets, and that it was a correct point. Complainant insists that respondent agreed to abide by the Meade survey, and this insistence finds support in the evidence. It clearly appears, however, that after the Meade survey respondent acquiesced therein and consented for the fence to be moved and erected on the line of said survey. Respondent said: "I was consulted about the moving of the fence, and it was with my permission that the fence should be set over."

The fence was so moved by the appellant in March, 1911, with the knowledge and consent of the respondent, and it seems to have so remained without objection from that time. Such acquiescence in the Meade survey by the respondent would prima facie indicate its verity and thereby raise the presumption of its correctness.—*Cooper v. Slaughter*, 175 Ala. 211, 57 South. 477; *Oliver v. Oliver*, 187 Ala. 340, 65 South. 373; *Smith v. Bachus*, 195 Ala. 8, 70 South. 261; 4 R. C. L. 69. True, respondent sought

[Chambless v. Jones.]

to explain such acquiescence by evidence to the effect that he merely consented to the removal of the fence to the line of the Meade survey in order to pacify the complainant; but this appears to have been but an uncommunicated motive, and his case must be judged by his acts and conduct.

(2) Before the filing of the bill counsel for the complainant requested the respondent to remove the eaves of the house and the pipes from complainant's premises, to which respondent replied, to quote the language of the witness: "That he might, after thinking the matter over, decide to move them in preference to being a respondent in a lawsuit, and asked him that, in the event I did decide to remove them, that I be given permission to enter the property as claimed by the complainant for the purpose of moving the property."

No survey of the property seems to have been made by the respondent until after the testimony for the complainant was taken in January, 1915, after which time the property was surveyed for the respondent by one Truss. Mr. Truss in his testimony was as positive and sincere as was Mr. Meade as to the correctness of the line established by him, and the survey of the former established the original fence as the correct boundary line. Mr. Truss also was a surveyor of many years' experience. He testified to his familiarity with the East Lake survey and the map thereof, and that he had surveyed in that community and was in fact at one time city engineer of East Lake. He testified that about 10 years previous he had surveyed a lot in the same block with those here under controversy, for a Mr. Sadler, and that he therefore took the Sadler lot as a starting point, assuming the previous survey to have been correct. Truss volunteers the information that at the time he made the Sadler survey its correctness was questioned by some of the old residents of East Lake; but he insists that they were men without experience in surveying or engineering, and that they were mistaken in their contention.

The deeds of the respective parties to these lots describe them as being rectangular, while the testimony of Truss seems to indicate that according to his survey they are not rectangular. Speaking to this question, the respondent, testifying in his own behalf, said: "My deed called for a rectangle, 50 feet front, 200 feet deep. I was present when Mr. Truss, my witness, testified that the lot could not be rectangular. I am familiar with the

[Chambless v. Jones.]

line established for me, on my lot 4, by Mr. Truss. I could not state whether or not those lines make a rectangular lot. I do not know if the stakes placed by Mr. Truss make a rectangular lot; if they do not make a rectangular lot, it would not be according to my deed. If the other lots in the block are rectangular, it would create confusion."

It is thus seen that the question of fact as to the correctness of the boundary line is a matter of much difficulty of solution. Each of the surveyors is positive and sincere as to the correctness of his own survey; but we cannot but be impressed, from the record, that the starting point of the Meade survey appears to have been such as to more surely lead to a correct result. If, however, it be conceded that the evidence in this respect is equally balanced, we should not lose sight of the testimony heretofore referred to as to the conduct of the respondent, his acquiescence for several years in the Meade survey as the true boundary line. This acquiescence creates a presumption in favor of the correctness of that survey, and we are of the opinion suffices to turn the scale in favor of the contention of appellant. The fence was placed by the appellant upon the line established by the Meade survey and acquiesced in by appellee; and the decree dismissing her bill leaves her as holding to the line of the Meade survey, but without the power to enforce her rights thereto. There was no cross-bill by the respondent, seeking the establishment of the correct boundary line.

Upon a careful consideration of the evidence in this case we are persuaded that the appellant met the burden of proof necessary to entitle her to the relief she prayed. The undisputed evidence shows that, if the Meade survey be held to be correct, then the eaves of appellee's house extend over and onto the property of appellant, and so likewise do the pipes. It therefore results that the decree of the court below will be reversed, and one will be here rendered granting to appellant the relief prayed in her bill.

Reversed and rendered.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

[Cook v. Cook.]

Cook v. Cook.**Separate Maintenance.**

(Decided May 11, 1916, 71 South. 986.)

Husband and Wife; Separate Maintenance; Evidence.—The evidence examined and held sufficient to warrant a decree for a reasonable allowance to the wife for a separate maintenance.

APPEAL from Marshall Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by Jesse Cook against Sam Cook for separate maintenance. Decree for respondent and complainant appeals. Reversed and remanded.

MCCORD & ORR, for appellant. **STREET & BRADFORD**, for appellee.

SAYRE, J.—This is a bill by the wife for separate maintenance. After a careful reading of the evidence the court is of the opinion that the wife (appellant) should have relief. The causes for which, on the surface of the record, appellee sent appellant back to her father, after they had been married for five months, fall far short of justifying his course. His real reason appears to have been that the wife proved persona non grata, and he expected entirely too much of her in her condition. From the circumstances of his offer to take her back, which, among other things, was made after this bill was filed, it does not appear to have been made for the bona fide purpose of mending the relations between them, but simply to avoid a decree for separate maintenance. The evidence shows that he was entirely willing to be rid of her on his own terms. Considering the probable true origin of their alienation, the burden of bringing about a reconciliation in the future should not be left to rest entirely upon the wife, especially so in view of the fact that the wife cannot possibly have enough out of the husband's very limited estate to maintain her in ease or idleness. Any allowance should, of course, be determined with reference to the condition of the parties. The wife, a frail woman, is absolutely dependent upon

[Webb v. Butler, et al. and Butler, et al. v. Webb.]

her family. We assume that she has a child. She was pregnant when she was taken back to her father's house and when the testimony was taken. The husband's estate, on the other hand, is small, and he has the care of four young children, the offspring of a previous marriage. Let the court arrange for a reasonably monthly allowance to the wife, or for a sum in bulk in lieu thereof, if that seems preferable. Any decree for continued payments may, upon due notice, be amended or modified as justice and equity may require.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

Webb v. Butler, et al. and Butler, et al. v. Webb.

Bill for an Accounting, Settlement and Contribution.

(Decided May 18, 1916. 72 South. 81.)

1. Partnership; Actions; Parties.—Where partners, as trustees, liquidated the partnership indebtedness, and filed a bill against their co-partners for contribution and accounting, all the members of the partnership are proper parties, and presumptively necessary parties.

2. Same.—Those partners not interested in an accounting, and not liable for partnership debts are not necessary parties to a bill for contribution and an accounting.

4. Same; Joinder.—Where the bill was filed by partners, who had liquidated the partnership debt, against their co-partners for contribution and accounting, it was not demurrable because it joined a former partner, as he was a proper, if not necessary, party, and it was not necessary that the bill should negative his defense of non liability.

4. Same; Contribution and Accounting; Plea.—The bill examined and held to sufficiently allege facts showing that certain partners who were not made parties were not interested in the settlement.

APPEAL from Jackson Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by J. C. Butler and another, individually and as trustee, against H. A. Webb and others, for an accounting, settlement, and contribution. From a decree overruling demurrers to the amended bill, defendants appeals. Affirmed.

The amendment makes all of the partners, or all the persons who were at any time members of said partnership, parties to the

[Webb v. Butler, et al. and Butler, et al. v. Webb.]

bill, except the following, who are not made parties for the reason stated, to-wit: W. H. Williamson, one of the original partners owning \$500 of the capital stock, departed this life on or about the 20th day of January, 1909. Soon thereafter administration was granted on his estate by the probate court of Jackson county, where intestate lived and died, and on March 15, 1909, his administrator transferred or assigned all interest of said estate in said partnership as shown by the list attached. Complainants aver that said estate was fully administered and all claims in favor of the partners or partnership creditors of said decedent were discharged or barred, and said estate is not now in any way accountable. M. A. Clay, one of the original partners, died December 5, 1909, and was at the time of his death living in Jackson county, and on December 24, 1909, his will was duly admitted to probate, and letters of administration with the will annexed granted upon his estate, and that thereafter his administrators by agreement in writing, executed by the trustees and other parties, compromised and settled all liability of the estate of Clay to the partnership, its creditors, or to the partners at any time engaged in the said business, which compromise and settlement was ratified by the probate court. A copy of the agreement, etc., is attached. J. W. Tipton & Co., original partners, owning \$100 of stock, transferred or assigned their shares of stock in said partnership to J. H. Williamson on April 13, 1906, a few months after the organization of the partnership, and said Williamson was accepted as a partner by the firm in lieu of Tipton & Co., and all of the debts and liabilities of the partnership existing at the time of the withdrawal of said Tipton & Co. were paid by the partners prior to its final dissolution, and are neither debtor nor creditor partners interested in this accounting. The firm of Butler, Rousseau & Co., original partners, consisted of J. C. Butler, C. M. Rousseau, and S. R. Butler, all of whom are now parties to this bill. Said firm has been dissolved and has not contributed anything to the payment of the said debts of the banking firm, and the said firm is in no way indebted to Butler, Rousseau & Co., and the individual members thereof who succeeded to and assumed all the liability of every kind held by any one against the said firm. W. B. Bridges, one of the original partners, died October 20, 1910, as cashier of the bank, and on his decease the banking business was discontinued. W. W. Bridges became a partner by the purchase of certain shares as shown in the list, and continued to

[Webb v. Butler, et al. and Butler, et al. v. Webb.]

be a partner at the time of dissolution. On December 21, 1910, the surviving partners and trustees of said bank entered into a written agreement with Mrs. Mary Bridges, the widow of W. B. Bridges, and the mother of W. W. Bridges, in and by which all liabilities of the estate of the said W. B. Bridges and of the said W. W. Bridges was fully compromised, settled, and satisfied. N. W. Wallace compromised and settled all of his liability growing out of his relation as surviving partner by agreement in writing with the trustees.

All these agreements referred to are set out as exhibits to the bill as amended.

LAWRENCE E. BROWN, and SPRAGINS & SPEAKE, for appellant.
BOULDIN & WIMBERLY, for appellee.

ANDERSON, C. J.—The opinion upon the former appeal in this case is reported in 192 Ala. 287, 68 South. 369, and the bill was subsequently amended in an effort to conform to said opinion. This appeal is from the ruling upon the demurrers both as to the want of necessary parties and the joinder of an improper party.

(1, 2) In the former opinion it was held that in order to a full accounting of the partnership affairs, all the persons at any time connected with the partnership should be made parties, unless there was averment showing that they no longer had any interest in the accounting to be had. That is, that being a member of the partnership *prima facie* requires their presence in the suit in order that it might be ascertained whether they were creditor or debtor partners as related to other partners. The bill does not involve the right of creditors against the partners, but an accounting, contribution, and settlement between the partners arising out of a settlement by some of them of the partnership debts and an equitable distribution of the assets and final settlement between the partners, or those of them who had not been finally discharged by their co-partners. While all partners would *prima facie* be necessary parties, and might under any conditions be proper parties, equity pleading would not forbid averment and proof dispensing with the necessity of making them parties to the cause. The law not only abhors unnecessary litigation, but should not be resorted to for the purpose of doing vain and useless things. We think that the amended bill suffi-

[Waddail v. Vassar, et al.]

ently sets up a state of facts to show that the representative of Williamson, deceased, was an unnecessary party as his estate was in no wise interested in the settlement between the other partners. The same as to J. W. Tipton & Co., Butler, Rousseau & Co., W. B. Bridges, W. W. Bridges, and N. W. Wallace.

(3, 4) As to S. R. Butler, he was a proper, if not a necessary, party, and the bill was not subject to demurrer for making him a party. The bill shows that he was for a good period connected with the bank firm, either individually or through his firm, and if he can show that none of the existing debts of the bank were incurred while he was a partner, and that he is in no way interested in the settlement, this would be defensive matter which need not be anticipated by an averment in the bill.

The decree of the chancery court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

Waddail v. Vassar, et al.

Bill to Declare and Enforce Resulting Trust.

(Decided May 11, 1916. 72 South. 14.)

1. **Equity; Laches; Prejudice.**—Mere delay which works no disadvantage to another and does not change circumstances in such sense that there can no longer be a safe determination of the controversy will not bar a complainant's right or remedy.

2. **Same; Statute of Limitation.**—Statutes of limitation do not bind the courts of equity where laches is invoked, unless there has been legal adverse possession.

3. **Trusts; Resulting; Parent and Child.**—Where the parent or husband pays the consideration for a conveyance to a child or wife, the presumption of an advancement arises and not a presumption of a resulting trust.

4. **Same; Bill; Establishment.**—Where the bill sought to have a resulting trust declared and alleged that plaintiff paid the consideration to one reared and regarded as a son, to purchase land for her (complainant), and that he had conveyance made to him, it was sufficient to rebut the presumption of advancement arising from the relation.

5. **Same; Laches.**—No hostile, adverse possession prior to the sale being alleged neglect to file bill to establish resulting trust from the time title was taken in the name of another, in 1902 and 1908, until less than two years after respondent undertook to sell, in 1913, some of the land, will not be

[Waddail v. Vassar, et al.]

deemed laches on demurrer which confesses that respondent is the holder of only the dry, legal title.

6. Same.—The establishment of a resulting trust is not defeated on the ground of laches by the conveyance of the land by respondent to his wife on the recited consideration of one dollar, and love and affection, the conveyance being made prior to the filing of the bill, as such conveyance does not confer any greater or different right than the respondent possessed.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by Mary L. Waddail against Robert Vassar and others to enforce a resulting trust in land. From a decree for respondent complainants appeal. Reversed and remanded.

LONDON & FITTS, for appellant. J. B. AIRD, and F. E. BLACKBURN, for appellee.

MCCLELLAN, J.—(1, 2) This bill, filed by the appellant against the appellees Vassar, among others, seeks to have declared and made effective resulting trusts in several city lots. The demurrers of the Vassars were sustained, on the single ground that complainant's asserted equities have become barred by laches. It has been well decided that mere delay that has wrought no disadvantage to another, or that has not operated to introduce changes of conditions and circumstances in consequence of which "there can be no longer a safe determination of the controversy," will not serve to bar a complainant's right or remedy.—*Snodgrass v. Snodgrass*, 185 Ala. 155, 163, 164, 64 South. 594; *Hauser v. Foley*, 190 Ala. 437, 67 South. 252; *Lucas v. Skinner*, 194 Ala. 492, 70 South. 88. Where the question of laches in the assertion of a right is presented, the facts and circumstances of each case will govern the court in the exercise of the sound discretion thereby invoked for the determination of the inquiry.—*Snodgrass v. Snodgrass*, *supra*; *Lucas v. Skinner*, *supra*. Statutes of limitations do not bind courts of equity in such cases, unless there has been an adverse possession within the law's contemplation.—*Shorter v. Smith*, 56 Ala. 208, 210, 211; *Lucas v. Skinner*, *supra*; *Scruggs v. Decatur Land Co.*, 86 Ala. 173, 5 South. 440.

(3) Where the purchase money of land is paid by a parent or husband, the title being taken in the name of the child or wife, "the presumption of intention" on the part of the parent or husband "to become the owner of the property arising from the

[Waddail v. Vassar, et al.]

payment of the purchase money is rebutted by the stronger counter presumption of an intention to make an advancement to the child or wife." Hence the presumption of a resulting trust does not arise from the mere fact that the purchase money is supplied by a parent or husband, and the title is taken in the name of the child or wife.—*Long v. King*, 117 Ala. 423, 430, 431, 23 South. 534.

(4, 6) It appears from the bill that Robert Vassar, in whose name the title to the several lots in question was respectively taken during the years 1902, 1904, and 1908, was reared as a son by the complainant from the time he, a "motherless infant," came under her care; that each regarded and treated the relation as that of parent and child; that after attaining his majority Vassar and his family lived upon the bounty of the complainant, and he served as the clerk and confidential adviser and assistant of the complainant in a retail business conducted by her, and was not called to any accounting; that this close relation existed during the time the complainant furnished the funds with which to purchase the lots in question; and that these purchases were made at his instance, and the funds of complainants were given to him, upon his suggestion, to purchase "for her" the lots involved. Notwithstanding the familiar rule which requires a pleading, when assailed by demurrer, to be most strongly construed against the pleader, we think the allegations entirely sufficient to overcome the stated presumption, raised by the relation (practically speaking) of parent and child existing at the time between complainant and Vassar, that complainant intended to make advancements to Vassar. Our opinion is that he could not and did not, in fact, purchase the lots "for her" when he took the titles thereto in his own name. It would be a strained and wholly unreasonable interpretation of the allegations of the bill to ascribe to them any meaning not consistent with her intent that he should take her funds and buy the land "for her," necessarily implying that the titles should be conveyed to her. He did not purchase for her if, as is averred, he purchased, with her funds, and had the title conveyed to himself. We can see no reason for concluding the complainant on the ground of laches. There is no allegation of an hostile, adverse possession of any of the lots by Vassar up to the time he first undertook to sell and convey some of them, viz., August 12, 1913, less than two years before this bill was filed. For the purposes of the hearing on the demurrer

[Waddail v. Vassar, et al.]

the averments of the bill must be taken as true; and so it must be ruled that the complainant was the equitable owner of the property; only the dry legal title thereto being invested in Vassar. Under these circumstances, in the absence of allegations showing adverse possession of the property by Vassar, no presumption of adverse possession of the property consequent upon or incident to the fact of Vassar's investment with the dry legal title thereto arose to affect the complainant's rights or their appropriate assertion in the premises.—*Shorter v. Smith*, 56 Ala. 208, 210. Aside from the fact that Vassar made sales of the lots on and after August, 1913, there is nothing in the bill indicating that Vassar claimed or held the lots in a right antagonistic to the rights of the complainant. Unless those sales of the property effect to introduce such changes in conditions and circumstances as to create disadvantages to those (ostensible purchasers) whose interests might be now prejudiced by the effectuation of complainant's asserted rights in the premises, there has been no such intervention of changed conditions and circumstances as precludes this complainant on the case made by the averments of the bill. Lots 13, 14, 16, 17, 18, and 20 described in the bill were conveyed by Vassar on August 12, 1913, to Vassar's wife on the recited consideration of "one dollar and love and affection." While the consideration recited was sufficient to support the conveyance as between parties thereto, yet it was not sufficient to clothe the wife, as grantee, with any different or greater right than Vassar himself would have enjoyed in the premises had he not undertaken to convey to her. She did not become a bona fide purchaser for value.—16 Cyc. pp. 165, 166; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; *Anthe v. Heide*, 85 Ala. 236, 4 South. 380. Hence the conveyance to the wife was but voluntary as against the complainant's equity; and the introduction of the subordinate right passing to the wife under the conveyance did not effect to make such a change in the pertinent conditions and circumstances as to preclude complainant from asserting the equity this bill discloses.—16 Cyc., supra.

There was error in sustaining the demurrer. The decree is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

[Eagle Coal Co. v. Gravlee, et al.]

Eagle Coal Co. v. Gravlee, et al.

Bill to Enforce a Lien.

(Decided June 1, 1916. 72 South. 30.)

1. **Landlord and Tenant; Rent; Lien; Pleading.**—A bill to enforce a lessor's lien for unpaid rent need not state the date upon which the lease was forfeited, where the time of the breach is otherwise made sufficiently definite.

2. **Equity; Cross Bill; Demurrer.**—The sustaining of demurrers to portions of an answer and cross bill setting up waiver by the lessors of their right to cancel lease for non-payment of rent will not bring about a reversal where this defense was a contested issue on which evidence was taken.

3. **Landlord and Tenant; Lien; Estoppel to Assert.**—When rightfully exercised a re-entry by the lessors does not estop them from filing a bill in equity to enforce their lien for unpaid rents on the improvements placed by the lessee on the leased property.

4. **Same; Judgment.**—In enforcing the lessor's lien on improvements on leased property the chancery court may order the improvements sold in bulk, although their value greatly exceeds the amount due; it not appearing that prejudice would result to the lessee, and such improvements being much more valuable in connection with the land.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Bill by G. W. Gravlee and others against the Eagle Coal Company, to enforce a lien for unpaid rent, after the annulment and cancellation of the lease. Decree for complainants and respondent appeals. Affirmed.

F. A. GAMBLE and J. B. POWELL, for appellant. RAY & COONER, for appellees.

MAYFIELD, J.—This is a suit by lessors to enforce a lien against lessees, after lease canceled and annulled for failure to pay rents in accordance with the written provisions thereof. The subject-matter of the lease was coal lands. The lessees were to open up coal mines on the lands, and to pay 7 cents per ton royalty or rent on all the coal mined from the lands, which was to be paid monthly. There was fixed a time limit after which a minimum royalty of \$150 per month was to be paid in any event, even though no coal at all was mined. There was also a

[Eagle Coal Co. v. Gravlee, et al.]

provision in the lease that a failure to pay the rent for three consecutive months should give the lessors the right to cancel the lease and take possession of the lands, and give them a lien upon the improvements placed on the lands by which to make good the rent or royalties in arrears. There was an alleged breach of these provisions, and the lessors took possession and filed this bill to enforce the lien given by virtue of the lease.

There was demurrer to the bill, which, being overruled, the lessees answered, making their answer a cross-bill, and sought to recover damages. or to be compensated for alleged injuries to and destruction of the improvements placed on the property by the lessees. Demurrers being overruled to the cross-bill, the complainants answered it, and much evidence was taken by both parties. On final hearing the court granted the relief prayed in the original bill and denied any relief to the respondents under the cross-bill, unless the amount of rent due was diminished or offset by some of the matters set up in the answer.

(1) It is first insisted that the trial court erred in overruling demurrers to the original bill. The bill was not subject to any of the demurrers interposed. It was not necessary to allege the exact date at which the lease was forfeited. The mere fact that the date of the month was not given was, under the terms of the lease and other allegations of the bill, immaterial. No injury was done respondents by reason of this date being omitted. The time of the breach was otherwise made sufficiently definite. The allegations were sufficient to show a forfeiture, and that possession was not taken by the lessors until after the lease was forfeited.

(2) The answer and cross-bill also set up, as a defense to the bill, a waiver of the provisions of the lease authorizing a forfeiture for non-payment of installments of rents. This was made an issuable fact by the pleadings, and much evidence was taken to that end; consequently there could be no prejudicial error in sustaining demurrers to certain parts of the cross-bill or answer.

(3) The lease gave the lessors the right to take possession of the lands, and the property or improvements placed thereupon were in their nature for the most part fixtures, and the lessors were given a lien upon them for the rents due and unpaid at the time of the forfeiture. Therefore, if the forfeiture was rightfully declared on this ground, the lessors had the right to hold

[Eagle Coal Co. v. Gravlee, et al.]

possession for the purpose of enforcing their liens. This was according to the terms of the lease. The possession of the lessors, according to the allegations of the bill and to the lessors' evidence, was therefore rightful and not wrongful, and hence did not prevent or estop them from maintaining this bill. The evidence, however, was in dispute on these questions; but the chancellor found the issues in favor of the complainants, and we are not prepared to say that he was in error.

(4) There was no reversible error in the chancellor's ordering all the property or improvements placed on the premises to be sold in bulk, even though the value thereof greatly exceeded the amount of the rent due, as ascertained by the decree. They were improvements placed on the lands rented, and were much more valuable, to remain there for their purposes, than they would have been if severed and removed from the lands. It does not appear that there was any article, not a fixture, that would be of sufficient value to pay the decree and costs; and even had there been such, the property constituting fixtures, such as houses, etc., which the lessees had no right to remove after the lease was canceled, would have to be sold in order for the lessees to obtain any benefit therefrom. We are not prepared to say that any injury was done appellants in selling the property in bulk rather than in parcels or part enough to pay the decree and costs. It is true that, as a rule, property ought not to be sold at execution or judicial sale, in bulk, if the value is liable to be thereby sacrificed, and only enough should be sold to satisfy the execution judgment or decree under which it is sold; yet in a case like this it is often better, if not necessary, to sell all in bulk, rather than in parcels. It is certain that it is not made to appear that the action of the trial judge in the present case was error, or was even of injury to the appellants.

Moreover, this is a judicial sale ordered, and the chancellor can disaffirm, if it appears that the property is thereby sacrificed, and order another sale, if sufficient reason be shown therefor, before the sale is confirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Reilly v. Woolbert.]

Reilly v. Woolbert.**Accounting Between Partners.**

(Decided May 18, 1916. 72 South. 10.)

1. **Partnership; Settlement; Bill.**—A bill for an accounting between partners which alleges that complainant purchased an undivided one-tenth interest in the coal mining business of respondent, and paid the stipulated purchase price, sufficiently alleged the partnership with all its legal incidents, and was not rendered demurrable because it did not contain a contractual specification of these incidents.

2. **Same.**—Where a partner is excluded from participation in the firm business he is entitled in equity to an accounting and settlement whether the nature of the account be simple or complicated.

3. **Accounting; Pleading.**—A bill for an accounting between a debtor and creditor alleging that respondent's indebtedness to complainant is by a complicated account consisting of numerous items of debit and credit, each month for many years, does not sufficiently allege a complicated account, and is demurrable.

4. **Same; Complicated Mutual Account.**—Numerous items of debit and credit extending over a period of years does not constitute a complicated mutual account in such sense as to confer equitable jurisdiction for an accounting between debtor and creditor.

5. **Frauds; Statute of; Demurrer.**—Where that fact does not appear upon the face of the pleading, a bill alleging a partnership in land and praying for an accounting is not rendered demurrable on the ground that the partnership contract was not in writing as required by the statute of frauds.

6. **Same; Interest in Lands; Partnership.**—An oral agreement for the purchase of an interest in the partnership consisting wholly or partly of land, is in violation of the statute of frauds as it involves title to real estate.

APPEAL from Blount Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by S. A. Woolbert against Andrew J. Reilly and others for an accounting and to declare interest in partnership lands. From a decree for plaintiff, defendant named appeals. Reversed, rendered, and remanded.

The bill of complaint as last amended shows that in April, 1905, the respondent Reilly owed complainant, Woolbert, \$2,419.76, for mining coal from respondent's land, which was operated as the Fairchilds Coal & Coke Company; that in that month it was mutually agreed that complainant should have a one-tenth interest in the business of the said company for every

[Reilly v. Woolbert.]

\$3,000 paid therein or put into said business; that the above "amount then due and owing complainant as aforesaid was to be applied as part payment on the first one-tenth interest to be acquired by complainant under the said contract;" that, beginning May 1, 1905, complainant was to become superintendent of the mine, on a salary of \$80 a month until the output exceed 100 tons a day, and \$100 a month thereafter; that complainant could draw \$50 a month of his salary, and "whatever sum became due him under his contract for services, as such superintendent, and not taken by him otherwise, should be applied on his purchase of an interest in said business as aforesaid; that by August, 1906, he had paid in \$3,000 for a one-tenth interest in the business, and by October 31, 1910, he had paid in \$6,046.71, and was entitled to a two-tenths interest; and that on that date respondent excluded him from participation in the business, and thereafter continued the business and refused to make any settlement with complainant. It is further alleged that respondent owned certain described real estate at the time of said agreement, and afterward purchased for the company with its funds other described land, and that it was agreed that these lands and complainant's money contributions should be the joint property of the partners on the basis of their respective interest. The prayers, are, in substance: (1) For an ascertainment of complainant's interest in the business, and a dissolution and a settlement thereof; and (2) for a sale of the land and distribution of the assets between the parties, or for a final accounting, dissolution, and settlement of the partnership, or, if not entitled as a partner for an accounting, to ascertain what sum is due from respondent to complainant.

The demurrer to the bill in whole and in its separate parts was overruled. Several special pleas setting up the statute of frauds were held insufficient. The answer admits an executorial agreement under which plaintiff was to purchase a one-tenth interest in the business in the manner specified, but denies that it ever became effectual by his payment of the stipulated price or otherwise, and denies any indebtedness to complainant, or any interest of his in the business or in the lands owned or purchased by respondent. On submission on pleadings and evidence, the chancellor decreed that a partnership existed between complainant and respondent from May 1, 1905, to January 1, 1912, in the proportionate interest of 1 to 9, respectively, and ordered

[Reilly v. Woolbert.]

an accounting in the partnership business by reference to the register.

STERLING A. WOOD, and GEO. W. DARDEN, for appellant.
M. L. WARD, and W. H. SMITH, for appellee.

SOMERVILLE, J.—(1) If the allegations of the bill are true, a partnership existed between complainant and respondent from August 1, 1906, by virtue of the completed payment by complainant of the stipulated price for a one-tenth interest in respondent's coal mining business. Such a purchase, by necessary implication, creates a partnership, with all of its legal incidents, and a contractual specification of those incidents is wholly unnecessary. This result is, of course, only upon the face of the bill, and takes no account of the statute of frauds, which will be considered hereafter.

(2) This relation, under the allegations of the bill, would entitle complainant to an accounting and settlement of the partnership business, as an independent equity, regardless of the nature of the account, whether complicated or simple. This is the primary aspect and purpose of the bill, and in this aspect it is not subject to the demurrer.

(3, 4) But there is also an alternative prayer for an accounting between the parties as creditor and debtor merely, in case no partnership is shown; and this rests on the allegation that respondent's indebtedness to complainant "is by a complicated account, consisting of numerous items of debits and credits each month for over five years." This allegation is not sufficient to show either a complicated or a mutual account, so as to necessitate or permit the exercise of an independent chancery jurisdiction in the premises.—*Chrichton v. Hayles*, 176 Ala. 223, 57 South. 696; *Phalin v. Dearman*, 181 Ala. 320, 61 South. 941. It is not sufficient, because numerous items are not necessarily complicated, and because debits and credits do not alone constitute a mutual account. The demurrer to this aspect of the bill was well taken, and should have been sustained.

(5) It does not appear upon the face of the bill that the alleged contract of purchase was not in writing, and hence that ground of demurrer was not well taken.

But as a defense to the entire bill, and to each separate part and aspect of it, respondent pleaded that the alleged agreement

[Hamilton v. Clancey.]

of purchase was void under the statute of frauds for wanting of a writing. This plea was held insufficient, and a partnership was held to have been created on May 1, 1905, by the parol agreement.

(6) Whatever the rule may be elsewhere, it must be regarded as settled in this state that a verbal agreement for the purchase of an interest in a partnership consisting wholly or partly of lands, involves the title to lands, and is violative of the statute of frauds.—*Butts v. Cooper*, 152 Ala. 375, 383, 44 South. 616—citing *Raub v. Smith*, 61 Mich. 543, 28 N. W. 676, 1 Am. St. Rep. 619, and other cases. The plea was, therefore, a good and sufficient answer to the bill as a bill to establish and settle a partnership, and the chancellor erred in holding otherwise.

With a proper amendment showing facts which would render an accounting—as between debtor and creditor—too complicated and difficult for an accounting at law, or showing mutual accounts between the parties, the bill may in any event be maintained in that aspect, if supported by proof, without regard to the question of partnership.

The decree of the chancellor, granting relief, will be reversed, and a decree will be here rendered, holding that the demurrer to the complaint as last amended is well taken, and is sustained as to grounds A, B, and C, and that plea 3 was sufficient as to every aspect of the bill except as for an accounting merely, and the cause will be remanded for further proceedings in accordance herewith.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Hamilton v. Clancey.

Bill to Foreclose Equitable Mortgage.

(Decided May 11, 1916. 72 South. 15.)

Chattel Mortgage; Foreclosure; Necessary Parties.—The original debtor or mortgagor is not a necessary party to a bill to foreclose an equitable chattel mortgage where he has parted with all title to the mortgaged property, and no deficiency judgment is sought against his assignee.

[Hamilton v. Clancey.]

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill to foreclose an equitable mortgage by John M. Clancy against Henry C. Hamilton and another. Decree for plaintiff, and defendant Hamilton appeals. Affirmed.

The bill in this case was originally filed by John M. Clancy against the appellant, Henry C. Hamilton, and one Alan Chester. The bill was subsequently amended by alleging that said Chester was a non-resident of the state, and by striking him as a party respondent. Respondent Hamilton then interposed a demurrer to the bill upon the ground that said Chester was a necessary party respondent. From the decree overruling this demurrer, he prosecutes this appeal.

The bill alleges that Alan Chester executed a note to Henry C. Hamilton on August 7, 1914, due September 7, 1914, in the sum of \$125, and that complainant is the holder of said note for value; the same having been transferred to him by Hamilton for the consideration of \$125, the indorsement of the transfer being "without recourse on Henry C. Hamilton." On the margin of the note was written the following: "Secured by Ames Automobile No. 45—1062." It is further averred that after the transfer of said note to complainant the automobile referred to was sold by Alan Chester to Henry C. Hamilton; that it is now in the possession of, and is the property of, said Hamilton, subject, however, to the right, title, or interest of the complainant therein. The bill then seeks a foreclosure of said equitable mortgage by a sale of the automobile under decree of the court, the proceeds to be applied, first, to cost of the suit, and, second, to the payment of whatever sum may be ascertained to be due complainant, and the balance, if any, to be paid to Henry C. Hamilton.

GORDON & EDINGTON, for appellant. JESSE F. HOGAN, for appellee.

GARDNER, J.—The above statement of the case discloses that the complainant in the court below sought a foreclosure of an equitable mortgage on the personal property, to-wit, the automobile, under a decree of the chancery court, so as to subject a sufficiency of the proceeds of the sale to the payment of the debt for the security of which it was given. The maker of the note, who may also be referred to the mortgagor, is shown to be a

[Interstate Land & I. Co. v. Logan.]

non-resident of the state. No decree is sought against him. The bill shows that he has, by an absolute sale of the property, parted with all his interest therein. He is therefore without any interest in the mortgaged property. Nor is relief sought against the respondent himself. The case is ruled by that of *Boutwell v. Steiner*, 84 Ala. 307, 4 South. 184, 5 Am. St. Rep. 375, the first headnote of which reads as follows: "The mortgagor is not a necessary party to a bill for a foreclosure, filed against a purchaser, or assignee, to whom he has sold and conveyed his entire interest in the lands, which is only an equity of redemption."

See, also, to the same effect, *Batre v. Auze's Heirs*, 5 Ala. 173; *Gravlee v. Lamkin*, 120 Ala. 210, 24 South. 756; *Kirk v. Sheets*, 90 Ala. 504, 7 South. 736; *Cooper v. Johnson* (C. C.) 157 Fed. 104.

No deficiency decree is here sought, but the complainant seeks only to have the mortgaged property condemned to the satisfaction of the debt. The mortgagor, having parted with all his right, title, and interest in the said property, is therefore not an indispensable party respondent to the bill.

We do not find that the cases of *Prout v. Hodge*, 57 Ala. 27, and *Harwell v. Lehman Durr Co.*, 72 Ala. 344, relied on by counsel for appellant, at all militate against the conclusion we have here reached.

The decree of the chancery court was in accordance with the views herein expressed, and it is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Interstate Land & I. Co. v. Logan.

Bill to Enjoin Foreclosure of Mortgage.

(Decided June 1, 1916. 72 South. 36.)

1. **Contributions; Exoneration.**—If equity has jurisdiction, it will apportion the burden ratably among the several debtors where there is a single claim against them; or if one is compelled to pay more than his share, will give him contribution against the other.

2. **Mortgages; Transfer of Property; Assumption of Mortgage Debt.**—The general rule is that a purchaser of mortgaged lands is not liable for the mortgage debt unless he expressly or impliedly agrees to pay it.

[Interstate Land & I. Co. v. Logan.]

3. **Same; Part of Purchase Price.**—Where the mortgage debt forms a part of the consideration of the purchase, the purchaser becomes the principal debtor to the extent of the property to indemnify his grantor, and a promise to discharge the obligation to that extent is implied, but the purchaser is under no personal liability for the mortgage debt.

4. **Same; Land Primarily Liable.**—Where the purchaser of a mortgagor assumes the payment of the mortgage but does not expressly assume any personal liability he is personally liable to the original mortgagor, but not to the mortgagee, and as to the mortgagor the purchaser becomes the principal and the original mortgagor a surety.

5. **Same; Action Against Purchasers.**—The mortgagee may recover in a suit against the purchaser who has assumed the debt, upon the ground of equitable subrogation.

6. **Same; Subjecting Property; Inverse Order.**—Where the successive purchasers of different portions of the mortgaged premises have notice, either actual or constructive, of prior sales, the rule of inverse order of alienation applies to their subjection to the mortgage.

7. **Same; Conveyance of Mortgagor's Interest.**—Where a grantee takes a parcel only, and his deed conveys only the mortgagor's right, title and interest in the land, such grantee assumes the whole of the incumbrance as a charge upon his parcel so purchased.

8. **Same.**—Where a grantee takes a parcel only, but receives a warranty deed therefor, he is, as to his grantor, freed from the lien of the mortgage, and his grantor assumes by the warranty the whole burden of the incumbrance as a charge on the unsold parcel.

9. **Same; Liability of Mortgagor and Grantee as Principal and Surety.**—Where the mortgagee releases a mortgagor or his grantee, liable as between the mortgagor and grantee, as principal, such release operates to release wholly or partially a mortgagor or his grantee liable as surety, in case the mortgagee had notice of the rights of such surety.

10. **Same; Partial Release; Restraining Foreclosure.**—Where the bill is by the grantee of a part of the mortgaged land to enjoin the foreclosure of the mortgage as to such land because the mortgagee has released from the mortgage a part of the land owned by another grantee, the bill is demurrable if it fails to aver the dates of the respective grants and of their recordation.

APPEAL from Geneva Chancery Court.

Heard before Hon. W. R. CHAPMAN.

Bill by the Interstate Land & Investment Company against Sallie H. Logan to enjoin the foreclosure of a mortgage; by amendment to the bill Mrs. G. H. Holloway was also made a party respondent. From a judgment for respondents on demurrer, complainants appeal. Affirmed.

C. D. CARMICHAEL, and BALL & SAMFORD, for appellant. W. O. MULKEY, and B. G. FARMER, for appellee.

THOMAS, J.—It is averred that Mrs. G. H. Holloway was the owner of about 2,000 acres of land described in her mortgage

[Interstate Land & I. Co. v. Logan.]

to Sallie H. Logan, of date October, 1909; that in 1911, for a valuable consideration and with covenants of warranty, she sold to the Montgomery Bank & Trust Company 1,323.50 acres of said lands. It is further averred that on the 2d day of January and on the 24th day of June, 1912, said mortgagee, Logan, executed a purported release from said mortgage to about 880 acres of said lands, in favor of J. C. McEachern, E. A. Majors, and D. H. Harris. It is further averred that said mortgagee had notice of the fact that the mortgagor, G. H. Holloway, had sold and conveyed, for a valuable consideration, said portion of the mortgaged lands to the Montgomery Bank & Trust Company, and that with this knowledge she executed these releases without receiving therefor and applying as a credit on said debt a pro tanto amount of the burden resting on the lands included in said mortgage, or without giving credit on said mortgage for any amount by reason thereof, and that said mortgagee was undertaking to enforce the entire mortgage debt against 2,323.50 acres sold by her said mortgagor, Holloway, to complainant. It is further averred that the value of the lands so released by the respondent Logan was equal to, or greater than, the amount of her mortgage debt.

(1) The right of exoneration arises out of a joint and several liability on the same obligation, and is strikingly illustrated in the maxim, "Equality is equity." So where there is a single claim against several debtors, if equity has jurisdiction it will apportion the burden ratably among them; or, if one is compelled to pay more than his share, will give him the remedy of contribution against the others.—Pom. Eq. Jur. §§ 406, 407, 410, 411, and 99, as to contribution.

This doctrine of the courts, as applies to a release by a mortgagee of one or more parcels of the mortgaged tracts of land, is clearly stated by the text-writers. Its best expression is:

"Although the equities between the subsequent owners of various parcels of the mortgaged premises, whether equal or unequal, do not prevent the mortgagee from enforcing the mortgage security, if necessary, against all these parcels, yet, after the mortgagee has received notice of the subsequent conveyances, the equities affect him to such an extent that he cannot deal with the whole premises, or with any parcel thereof, or with the owner of any parcel, by release or agreement, so as to disturb the equities subsisting among the various owners, or to destroy

[Interstate Land & I. Co. v. Logan.]

their rights of precedence in the order of liability, or to defeat their rights of ratable contribution, or of complete or partial exoneration. No such obligation, however, rests upon the mortgagee, nor is he prevented from dealing with the mortgaged premises in any manner consistent with his general rights as a mortgagee, unless he has received notice of the conveyances to the subsequent owners whose interests could be affected by his dealings; but notice of their conveyances would be a notice of all the equities which arise therefrom. Since his mortgage is a prior lien, and creates an incumbrance alike upon all parts of the land subject to it, no subsequent change in the ownership of the mortgaged premises, of which he is ignorant, can in any degree control or limit his original rights and power conferred by the security. It is settled, therefore, that notice must be given to the mortgagee of any subsequent conveyance of a parcel of the mortgaged premises, so as to prevent him from affecting the equities of the grantee therein by his dealings with other portions of the same premises. * * * The effect of a partial release by the mortgagee who is charged with notice differs in the two cases where the equities of the various owners are equal and where they are unequal. In the first case, where the mortgaged premises have been conveyed to or are held by various owners, in such manner that their equities are equal, and all their parcels or shares are liable to a ratable contribution, if the mortgagee, having notice of such condition, releases one of the parcels or shares, he thereby discharges a part of the mortgage debt, equal to the ratable portion thereof chargeable upon the lot released, while the balance of the debt alone remains a burden upon the other parcels or shares of the premises. The release of one parcel or share would release all the other parcels from the same proportionate amount of their respective original liabilities which the value of the part released bears to the total value of the mortgaged premises; one owner being released, all the others are entitled to a pro rata abatement. When the equities of the various owners are unequal, so that their respective parcels are liable in the inverse order of alienation, if the mortgagee, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases all those parcels which are subsequently liable, in the order of their several liabilities, from an amount of the mortgage debt equal to the value of the parcel released. If the value of the parcel released equals the mortgage

[Interstate Land & I. Co. v. Logan.]

debt, then all the subsequent parcels are wholly relieved from liability; if the value is less than the mortgage debt, the subsequent parcels can, at most, be liable, in their order, only for the excess of the debt over such value."—3 Pom. Eq. Jur. (3d Ed.) § 1226.

In *Winston v. Yeargin*, 50 Ala. 340, Justice Saffold declared, of the duty of the principal debtor to the sureties, that each case should be decided on its merits according to the justice and equity of the attending circumstances, and that it is the doctrine of the courts that the creditor is a trustee of his execution for the benefit of the surety, and, though not bound to active diligence, yet, if he voluntarily interferes and by his own act releases the lien, the surety is discharged. In *Hudson Trust Co. v. Elliott, as Ex'x*, 194 Ala. 441, 69 South. 631, where the rights of the surety against whom judgment had been obtained was under consideration, this court held that where the creditor has liens on the properties of the party primarily liable, and on those of the surety, for the same debt, the surety has an equity, on foreclosure, to require the property of the principal to be first applied to the payment of the debt.—*Pac. G. Co. v. Anglin*, 82 Ala. 492, 1 South. 852; *Bramlett, et al. v. Kyle, et al.*, 168 Ala. 325, 329, 52 South. 926. The fact that the liens were created by mortgage, rather than by judgment, can make no difference in the application of the principle involved. It grows out of the duty of the principal debtor to pay the debt and extinguish the alternative liability of the surety. It is the duty of the creditor to recognize this right when it can be done without injury to himself.

In a bill to restrain foreclosure of a mortgage under its power (*Bramlett v. Kyle*, 168 Ala. 325, 52 South. 926), this court has recently held that the doctrine of exoneration is the weapon of the surety, whether that relation be affirmed by the contract itself, or be the product of equity's motive to attain natural justice on the theory that the real beneficiary of the obligation assumed by the parties should discharge the burden.

(2-4) It is important, then, to know who is the principal debtor to the mortgagee when that relation changes to that of purchaser from the mortgagor. As a general rule, a purchaser of mortgaged lands is not liable for the mortgage debt, unless he expressly or impliedly agrees to pay the same.—*Fiske v. Tolman*, 124 Ala. 254, 26 Am. Rep. 659; *Patton v. Adkins*, 42 Ark. 197; *Scholten v. Barber*, 217 Ill. 148, 75 N. E. 460; *Bristol Sav. Bank*

[Interstate Land & I. Co. v. Logan.]

v. Stiger, 86 Iowa 344, 53 N. W. 265; *Crane v. Hughes*, 5 Kan. App. 100, 48 Pac. 865; *Canfield v. Shear*, 49 Mich. 313, 13 N. W. 605; *Van Eman v. Mosing*, 36 Okl. 555, 129 Pac. 2. When the mortgage debt forms a part of the consideration of purchase, the purchaser becomes the principal debtor, to the extent of the property, to indemnify his grantor, and the promise to discharge the obligation to that extent is implied from the nature of the transaction.—*Foy v. Armstrong*, 113 Iowa 629, 85 N. W. 753; *N. W. Bk. v. Stone*, 97 Iowa 183, 66 N. W. 91; *Schlatre v. Greaud*, 19 La. Ann. 125; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Flagg v. Thurber*, 14 Barb. (N. Y.) 196; *Thompson v. Thompson*, 4 Ohio St. 333; *Moore's App.*, 88 Pa. 450, 32 Am. Rep. 469; *L. U. In. Co. v. Dunn*, 167 Ill. App. 22. But the purchaser is under no personal liability to his grantor (the original mortgagor), or to the owner of the mortgage, for the mortgage debt. *Hubbard v. Ensign*, 46 Conn. 576; *Lawrence v. Towle*, 59 N. H. 28; *Equitable L. A. Soc. v. Bostwick*, 100 N. Y. 628, 3 N. E. 296; *Belmont v. Coman*, 22 N. Y. 438; 78 Am. Dec. 213. Where, however, the vendee of the mortgagor assumes the payment of the mortgage but does not expressly assume any personal liability, he is not personally liable to the mortgagor, and as between him and his grantor (the mortgagor) he becomes the principal debtor, and the vendor (his mortgagor) a surety.—*Green v. Hall*, 45 Neb. 89, 63 N. W. 119; *Bennett v. Bates*, 94 N. Y. 354; *Granger Case*, 6 S. D. 611, 62 N. W. 970.

The doctrine of the Supreme Court of the United States, except when settled by the *lex fori*, is that a grantee who has assumed the payment of a mortgage is by that assumption liable to the mortgagee in equity under his contract of purchase with the mortgagor. This doctrine, according to Mr. Justice Gray, in *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 32 L. Ed. 677, is rested on the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt, and does not rest upon any liability of the principal to the creditor, nor upon any peculiar relation of the surety toward the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is him-

[Interstate Land & I. Co. v. Logan.]

self a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person who is admitted to be the creditor's debtor stands at the time of receiving the security in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

(5) Contrary to the common-law rule, in this state a mortgagee is allowed to recover in a suit against the purchaser who has assumed the debt, "upon the ground of equitable subrogation."—*Young v. Hawkins*, 74 Ala. 370; *Carver v. Eads*, 65 Ala. 190; *N. Ala. D. Co. v. Short*, 101 Ala. 333, 13 South. 385—where vendors' liens were assumed by the purchasers.

In the authorities above cited, we note that the primary liability from mortgagor to mortgagee may shift, by agreement of purchase and transfer, from the mortgagor to his grantee, if the terms of the contract of purchase are such as to evidence the intention on the part of the purchaser to assume this primary liability. If, however, the consideration of the conveyance and its express terms were not such as to shift this primary liability from the mortgagor to his grantees of the several portions of the mortgaged premises, the relation of such purchaser and his property is that only of a security for the primary liability, to the extent of the value of the property purchased.—*Eakin v. Shultz*, 61 N. J. Eq. 156, 47 Atl. 274; 2 Jones on Mortgages, § 983.

The principle of the rule has been frequently stated by the English and Irish courts. Lord Plunkett held that, if a mortgagor sells a portion of his equity of redemption for a valuable consideration, "the entire residue undisposed of by him is applicable, in the first instance, to the discharge of the mortgage, and in ease of the bona fide purchaser; and it is contrary to every principle of justice to say that a person afterward purchasing

[Interstate Land & I. Co. v. Logan.]

from that mortgagor shall be in a better situation than the mortgagor himself in respect to any rights.”—*Hartley v. O’Flarety*, Lloyd & G. Cases Tem. Plunket, 208, 216. Lord Chancellor Hart said, in the *O’Flarety Case*, that, between the mortgagor and the persons purchasing from him, “the contributory fund must be so marshaled as to make his remaining property first liable; and if that is insufficient, I think the portion of the last purchaser must be applicable before that of any prior purchaser.”—Beatty, 61, 79, 80; 3 Jones on Mortgages, § 1621, p. 224.

(6) This equity of the rule of “inverse order of alienation” is on foreclosure subject to the rule of notice on the part of the grantee. If, however, the successive purchasers of different portions of the mortgaged premises have notice, actual or constructive, of prior sales, the rule applies to their subjection to the mortgage in inverse order of alienation. Unless the last purchaser took with notice of the prior sales the portion last sold cannot be applied in satisfaction of the mortgage, in exoneration of the portions first sold.—*Aderholt v. Henry*, 87 Ala. 415, 6 South. 625, 6 L. R. A. 451.

In *Brown v. Simons*, 44 N. H. 475-479, the writing justice says: “In the case of the sale by the mortgagor of all the mortgaged property to different purchasers at the time, their equities must be regarded as equal, and each must contribute ratably to the discharge of the common burden; but, if such conveyances are at different times, their equities, though equal as respects the mortgagor, are not equal as respects each other, because, as the land last conveyed, while in the hands of the mortgagor, was primarily liable for the whole debt, it is not equitable that its character should be changed and the charge upon it diminished by a subsequent conveyance, and, beside, if the equities were to be regarded as equal, that of the first purchaser is prior in point of time, and neither having the legal title, the maxim, *qui prior est in tempore, potior est in jure*, must apply. * * * If, however, at the time of the subsequent conveyance by the mortgagor, the grantee has no notice of the prior conveyance, in fact or constructively (the same not having been registered), such subsequent grantee ought not to take the land so granted, subject primarily to the whole debt. On the contrary, as the prior grantee has failed to record his deed, and thus give notice of the true state of the title, the subsequent grantee, unless otherwise

[Interstate Land & I. Co. v. Logan.]

notified, may rightfully regard the land, which is thus apparently in the hands of the mortgagor, as primarily liable for the whole debt. It is true that the first grant by the mortgagor of a part of the property does not in terms impose a lien upon what is left; but in effect it creates upon it, as between the parties, a new incumbrance, and makes it liable primarily for the whole debt, as much as if such mortgagor had mortgaged it to such purchaser to indemnify him against the original mortgage."

The reason of these cases supports the rule declared in 2 Jones on Mortgages, § 982, also section 722 et seq., to the effect that, by releasing that part which is in equity primarily liable for the payment of the mortgage debt, he cannot be permitted to charge the other portions of the premises with the payment of the mortgage without deducting from the amount due the value of the part released.—*Northwestern Land Ass'n v. Harris*, 144 Ala. 468, 21 South. 999; *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; *Iglehart v. Crane*, 42 Ill. 261; *Webb v. Rowe*, 35 Mich. 58; *Groesbeck v. Mattison*, 43 Minn. 547; 46 N. W. 135; *Brigham v. McDonald*, 19 Neb. 407, 27 N. W. 384; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *In re. Shepherd's Appeal*, 2 Grant Cas. (Pa.) 402. Upon the same principle, after the mortgaged premises have been passed to several devisees, if the mortgagee, with knowledge of the transfer, releases one devisee's portion, the others are liable only for that share of the debt for which their portion would be liable had no release been made.—*Gibson v. McCormick*, 10 Gill & J. (Md.) 65.

Owners of the portions of the mortgaged estate not released cannot claim an entire release of their own property from the mortgage lien because of a partial release of the mortgaged property, but they must in every case pay their fair proportion of the mortgage debt. The mortgage security at most is affected only to the extent of the value of the property released.—*Williams v. Wilson*, 124 Mass. 257; *Frost v. Koon*, 30 N. Y. 428; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; *Guion v. Knapp*, 6 Paige (N. Y.) 35, 29 Am. Dec. 741.

In *Farmers' S. B. & L. Ass'n v. Kent, et al.*, 117 Ala. 624, 23 South. 757, this court quoted approvingly from Pomeroy that: "Whenever the mortgagor has conveyed separate parcels of the mortgaged premises by warranty deeds to successive grantees, and there are no special provisions in any of their deeds, and no

[Interstate Land & I. Co. v. Logan.]

other dealings between themselves or with the mortgagor which disturb the equities otherwise existing, a priority results, depending upon the order of conveyance. As between the mortgagor and all the grantees, the parcel in his hands, if any, is primarily liable for the whole mortgage debt, and should be exhausted before having recourse to any of theirs; as between the grantees, their parcels are liable in the inverse order of their alienation, and any parcels chargeable first in order must be exhausted before recourse is had to the second."—Eq. Jur. vol. 3, § 1224.

The opinion (*Kent's Case*) also quotes Jones (Mortg.): "The mortgagee, when he afterwards proceeds to foreclose his mortgage, should be required to sell in the first place such part, if any, as the mortgagor still retains, and then the parts that have been sold in the same subdivisions, but beginning with the parcel last sold by the mortgagor."—Volume 2, § 1620.

This ruling has long been adhered to by our courts and has become a rule of property in this state.—*Burton v. Henry*, 90 Ala. 281, 7 South. 925; *Aderholt v. Henry*, 87 Ala. 415, 6 South. 625, 6 L. R. A. 451; *Prickett v. Sibert*, 75 Ala. 315; *Howser v. Cruikshank*, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76; *F. S. B. & L. Ass'n v. Kent*, 131 Ala. 246, 30 South. 874; *M. M. D. & M. I. Co. v. Huder*, 35 Ala. 713.

(7-9) For the reason of all the cases we have cited, the right of exoneration is not an absolute rule of law, but is of purely equitable origin. It is never allowed to work injustice, being subject to modification by particular circumstances affecting the rights and equities of the several purchasers as between themselves. This right of necessity must rest upon peculiar equitable reasons, and if no such reasons exist the right of exoneration does not exist.—*Aderholt v. Henry*, 87 Ala. 415, 6 South. 625, 6 L. R. A. 451; *N. L. Ass'n v. Harris*, 114 Ala. 468, 21 South. 999. It is obvious that the doctrine has its foundation in the intention of the parties to the conveyance. The grantee taking a parcel by deed conveying only the mortgagor's right, title, and interest in the land, assumes the whole of the incumbrance as a charge upon his parcel so purchased. The grantee who takes the parcel conveyed him by a warranty deed is freed from the lien of the mortgage, and the grantor assumes by the warranty the whole burden of the incumbrance as a charge upon the unsold parcel, and has a parcel obligation. The mortgagee not being a party to the contract of sale is not affected thereby, nor is his lien upon the

[Interstate Land & I. Co. v. Logan.]

entire tract impaired by such subsequent sales to different grantees. As against the mortgagee "before foreclosure or before a release by him of any portion of the mortgaged premises in case of several sub-purchasers from the mortgagor, the grantee in the first deed has only the right to have him, after notice, to foreclose or release so as not to disturb the equities subsisting among the various owners or not to destroy their right of precedence in the order of liability, or not to defeat their rights of ratable contribution or of complete and partial exoneration." The mortgagee is not prevented from dealing with the mortgaged premises in any manner consistent with his general rights as a mortgagee, unless he has received actual notice of the conveyance to the subsequent owners whose interest would be affected by his dealings. Since his mortgage is a prior lien and creates an incumbrance alike upon all parts of the land subject to it, no subsequent change in the ownership of the mortgaged premises, of which he is ignorant, can in any degree control or limit his original rights and power conferred by the security. It is settled therefore that notice must be given to the mortgagee not having knowledge thereof, of any subsequent conveyance of a parcel of the mortgaged premises, so as to prevent him from affecting the equities of the grantee therein by his dealing with other portions of the same premises.—3 Pom. Eq. Jur. § 1226; 2 Jones on Mort. § 1624; *Pitts, et al. v. R. F. L. M. Co.*, 123 Ala. 469, 26 South. 286; *Hosmer v. Campbell*, 98 Ill. 572; *Chesbrough v. Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Vanorden v. Johnson*, 14 N. J. Eq. 376, 82 Am. Dec. 254; *Patty v. Pease*, 8 Paige (N. Y.) 277, 35 Am. Dec. 683; *Guion v. Knapp*, 6 Paige (N. Y.) 35, 29 Am. Dec. 741.

The bill avers the contract of purchase between the Montgomery Bank & Trust Company and the respondent in this suit, Mrs. G. H. Holloway, of a large tract of land embracing the lands in question the property of the latter as evidenced by two warranty deeds, reciting a valuable consideration, and which said deeds are made exhibits to the bill.

Notwithstanding a confusion in the amended bill in reference to Exhibits A and B, it is clear that Exhibit B, acknowledged before W. B. Hammond, was the initial conveyance, and that Exhibit A, acknowledged before G. D. Baker, was for the purpose of correcting a "certain description in the deed." In Exhibit B,

[Interstate Land & I. Co. v. Logan.]

after the description of the land described in the Logan mortgage, is the further recital: "This last described property is subject to the mortgage of \$4,000 to Mrs. F. H. Logan." The grantor then covenants with the grantee as follows: "To have and to hold the aforesaid premises, to the said Montgomery Bank & Trust Company, its successors and assigns, forever.

"And I do covenant with the said Montgomery Bank & Trust Company, its successors and assigns, that I am lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that I have a good right to sell and convey the same to the said Montgomery Bank & Trust Company, its successors and assigns, and that I will warrant and defend the said premises to the said Montgomery Bank & Trust Company, its successors and assigns, forever, against the lawful claims and demands of all persons."

In Exhibit A, the subsequent deed, taken to correct the description in the former deed, is the expression, "This last described land is subject to a mortgage of \$4,000 due to Mrs. Sallie H. Logan," and a covenant of warranty that the lands "are free from all incumbrances except as herein set out," and another, that the grantor "will warrant and defend the premises to the said Montgomery Bank & Trust Company, its successors and assigns, forever, against the lawful claims and demands of all persons."

We do not now pass upon the effect of Mrs. Holloway's covenants of warranty, in her conveyance of the lands in question to the Montgomery Bank & Trust Company. See *Northwestern L. Ass'n v. Harris*, 114 Ala. 476, 21 South. 999; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 577, 66 Am. Dec. 445; *Sumner, Adm'r, v. Williams*, 8 Mass. 202, 5 Am. Dec. 83; *Howell v. Richards*, 11 East 633; *Smith v. Compton*, 3 Barn. & Ad. 189; *Kean v. Strong*, 9 Irish Law Rep. 74, 82.

This court has held that there must be an assumption by agreement between the parties that the mortgage shall be a part of the purchase money for the premises (*Kennedy v. Brown*, 61 Ala. 296; *Hall, et al. v. M. & M. Ry. Co.*, 58 Ala. 10, 23); that when deeds to successive grantees are not warranty deeds, but are conveyances of the mortgagor's right, title, and interest in the parcels so conveyed, the intention is clear that the grantees respectively assume their proportions of the mortgage debt

[Interstate Land & I. Co. v. Logan.]

(*Aderholt v. Henry*, 87 Ala. 415-421, 6 South. 625, 6 L. R. A. 451; 3 Pom. Eq. Jur. § 1225).

The purchaser of an equity of redemption does not become personally liable for the mortgage debt by accepting a deed which is merely subject to the mortgage. It must be clear that it was the agreement of the parties thereto that the mortgage debt was assumed by the grantee; there must be a "special contract to pay such incumbrance."—2 Dev. on Real Est. (3d Ed.) §§ 1047, 1048, and authorities there collected. If the purchaser is a bona fide purchaser of the property, or with stipulations and warranties of title freed of incumbrances, he is unquestionably entitled to have exoneration to the extent of his equities, as against the mortgagor, the mortgagee with actual notice, and subsequent grantees of the mortgagor, being within the rule we have declared.—*Aderholt v. Henry*, *supra*.

If the Montgomery Bank & Trust Company was the last purchaser from the mortgagor, Mrs. Holloway, and had notice of the prior conveyances of the several parcels of the mortgaged lands to McEachern, Watson, Majors, and Harris, or if it was understood and agreed between the vendor, Holloway, and the trust company, that the lands so conveyed to it were subject to the Logan mortgage, and that the trust company, as a part of the consideration for the conveyance, assumed the payment of said mortgage, no relief can be had by the trust company.

(10) It is sufficient that we hold that the demurrer directed to the failure of the bill as amended to aver the dates of the respective parcel conveyances by Mrs. Holloway to the said several purchasers after the execution and delivery of the Logan mortgage thereon, and to the failure to give the respective dates of recordation of said several conveyances to McEachern, Watson, Majors, and Harris, was properly sustained.

Decision as to the effect of Mrs. Holloway's covenants of warranty is reserved for the hearing on full pleading and proof.

The complainant is given 30 days in which to amend its bill if so advised, and the case is affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and SOMERVILLE, JJ., concur.

[Ward, et al. v. Markstein.]

Ward, et al. v. Markstein.

Bill to Enjoin Liquor Inspection Ordinance.

(Decided May 25, 1916. 72 South. 41.)

1. **Inspection; Laws; Purpose.**—Subdivision 31, § 25, Local Acts 1898-9, p. 1415, Birmingham City Charter, and §§ 1279-1295, Code 1907, provide for only those inspections having the ordinary protective purpose against fraud or imposition in commercial dealings, or against the impairment of the reputation of an article manufactured for exportation.

2. **Municipal Corporation; Ordinances; Conflict with General Law.**—A municipal ordinance inconsistent with the general policy of the state as declared in its general legislation is void unless expressly authorized by the legislature, the provisions of § 89, Constitution 1901, having no application to limit the inhibition to cases where the legislature has made an act unlawful, and a municipality was trying by ordinance to make it lawful.

3. **Intoxicating Liquors; Ordinances; Validity.**—Birmingham Ordinance No. 345C is invalid as inconsistent with the policy as to liquors declared by the legislature, Acts 1915, p. 555, notwithstanding Local Acts 1898-9, p. 1415, Acts 1909, p. 174, General Acts 1915, p. 296, and §§ 1279, 1295 and 1341, Code 1907.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Bill by D. H. Markstein against George B. Ward and other commissioners in the city of Birmingham, to enjoin the enforcement of the liquor inspection ordinance. From a decree for complainant, respondents appeal. Affirmed.

The facts sufficiently appear. The ordinance, section 4 thereof, is as follows: That it shall hereafter be the duty of any person, firm or corporation who transports, receives, accepts delivery of, possesses or has in possession within the city of Birmingham, or the police jurisdiction thereof, prohibited liquors, or any of them, to forthwith submit the same for inspection to the liquor inspector or his deputy at the nearest office of the liquor inspector, provided, however, that liquor while being transported as interstate commerce shall not be subject to such inspection, and when prohibited liquors, or any of them are brought into the city of Birmingham or the police jurisdiction thereof after this ordinance goes into effect by means of interstate commerce, it shall be the duty of the consignee, his agent or representative receiving or accepting delivery thereof from the common carrier, immediately after the delivery thereof by

[Ward, et al. v. Markstein.]

the common carrier to submit the same for inspection to the liquor inspector or his deputy at the nearest office of the liquor inspector. In such cases the liquor inspector or his deputy to whom such prohibited liquors, or any of them are submitted, shall examine the package containing same, and shall inspect such package and each bottle, vessel or receptacle therein contained to determine whether or not such package contained such quantity of liquors in receptacles of such capacity as can be lawfully received, possessed or had in possession, and to determine whether or not such a package contained any advertising matter, price list or other matter, the circulation of which is prohibited by the ordinances of this city, or the laws of the state. The person submitting such prohibited liquors or any of them, to the liquor inspector or his deputy, shall pay an inspection fee of 50c for each package, and all such fees shall daily be paid into the city treasury by the liquor inspector and his deputy. When the liquor inspector or his deputy making the inspection has completed same, he shall place upon the exterior of the package in a conspicuous place a certificate of the inspector or his deputy making the inspection executed in duplicate, which certificate shall bear in number, and shall carry the name and address of such consignee, the date and result of the inspection, and a brief inventory of the contents, and shall be signed by the inspector or his deputy making the inspection, but the signature may be by initials. Such inspector or his deputy making the inspection shall also place upon each bottle, vessel or receptacle contained in such package, a stamp containing the same number as that placed upon the exterior of the package. But this section shall not apply to the receipt or possession of alcohol by persons who are permitted by law to possess, sell or use the same, nor to the receipt or possession of wine for sacramental purposes when received and possessed in accordance with the rules and regulations prescribed by law.

Subdivision 31, § 25, p. 1415, Local Acts 1898-99, is as follows: (31) To pass and enact inspection laws within the city, and to regulate the weighing and measuring of produce and provisions for man or beast, and to provide for the inspection and gauging of liquors, and to punish the use of false weights and measures.

Special Session Acts 1909, p. 174, is as follows: That the governing body of towns and cities of the state shall have and

[Ward, et al. v. Markstein.]

exercise full power and authority to adopt ordinances not inconsistent with the laws of the state to promote temperance and to suppress intemperance, and to suppress the traffic in such beverages as the laws of the state prohibit to be manufactured, sold, or otherwise disposed of, and to prevent invasions of such ordinances, also power to forfeit licenses granted by said towns and cities if the licensee violates said ordinances, and the power to provide for the destruction of liquors and beverages kept for sale in violation of law or for other illegal purposes, and that may be declared contraband. That this shall not be construed as limiting or diminishing the police powers of the towns and cities of the state under existing law, the purpose being to confer said powers in express terms, and to remove any question as to their existence.

General Acts 1915, p. 296, § 6, is as follows: Such cities shall have full, complete, unlimited and continuous power and authority, from time to time, to adopt ordinances and regulations not inconsistent with the laws of the state, and the federal and state Constitutions to carry into effect or discharge the powers and duties conferred by law upon such cities, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, orders, comfort, and convenience of the inhabitants of the city, and to prevent and punish injuries and offenses to the public therein, and to prevent conflict and ill feeling between the races in such cities, etc.

The provisions of the Code sections sufficiently appear.

M. M. ULLMAN, and W. A. JENKINS, for appellant. PERCY, BENNERS & BURR, and ALLISON, LYNCH & PHILLIPS, for appellee.

MCCLELLAN, J.—On the 9th day of February, 1916, the board of commissioners of the city of Birmingham adopted Ordinance No. 345 C. By its terms the ordinance became effective on the 21st day of February, 1916. The methods and measures the ordinance undertook to establish—the observance of which it assumed to enjoin upon all within its purview and effect—were put into operation in and over the police jurisdiction of the city of Birmingham. Pending the operation and enforcement of the measures and methods prescribed by the ordinance, this bill for injunctive relief was filed, and the respondents seasonably answered. The court below adjudged the ordinance to be invalid.

[Ward, et al. v. Markstein.]

Litigants on both sides of the line invoke a decision on the merits without regard to any possible question that might only serve to defer final adjudication of the single vital inquiry, viz., whether the ordinance is void.

The ordinance is generally referred to as the "Liquor Inspection Ordinance." Its design is to require the submission of the liquor therein defined to the inspection of the liquor inspector or of a deputy liquor inspector, appointed by the city commission. This object is sought to be effected by laying the duty on the receptor or possessor, within the city's jurisdiction, of such liquors to bring the package he has received to the view of the nearest inspector; and to penalize the failure to observe the duty thus enjoined. The definition of the subject of the inspection contemplated excludes any liquors that are still within the sphere of interstate commerce. It is designed to operate upon liquors that have passed without the protection or effect of interstate commerce. A fee of 50 cents for each package inspected under the ordinance is exacted of every one submitting the package received or possessed by him to the inspection prescribed. The method of inspection and the service required of the inspector are set down in section 4 of the ordinance. This section is reproduced ante, in the report of the appeal. In other sections of the ordinance there are many provisions intending to compel and to enforce, under penalty, the observance of the duty declared in the ordinance to subject every package of liquor, within its description, to the inspection designed. The caption of the ordinance is as follows: "Ordinance No. 345C. To be entitled an ordinance to prevent evasions of the ordinances of the city of Birmingham for the promotion of temperance and concerning the sale, keeping for sale, etc., of certain prohibited liquors and beverages, to reduce and discourage the use and consumption of prohibited liquors and beverages, and to prevent injuries and offenses to the public of the city."

In the body of the ordinance (section 3) it is written: "All funds derived from the inspection of liquors under this ordinance shall be devoted exclusively to defraying the cost of the inspection of such prohibited liquors, to the enforcement of the prohibition laws and ordinances of the city of Birmingham, and for the purpose of preventing evasions and violations of the state laws and city ordinances designed to suppress the evils of intemperance and to protect the city and its inhabitants from the evils

[Ward, et al. v. Markstein.]

connected with or growing out of the sale of, traffic in, use, possession and consumption of spirituous, vinous, malted, fermented and other intoxicating liquors and for maintaining an efficient system of inspection and police regulation thereof and efficient records of the names of persons using or receiving such liquors and the amount and kind thereof."

By section 9 it is provided: "This ordinance shall be liberally construed so as to accomplish the purpose thereof, which is to further suppress the evils of intemperance and secure obedience to and the enforcement of the ordinances of the city of Birmingham for the promotion of temperance and for the suppression of the manufacture of and traffic in prohibited liquors and to prevent evasions and subterfuges by which said ordinances may be violated, and to restrict the consumption of intoxicating liquors within this city and the police jurisdiction thereof."

(1, 2) The Legislature of 1911 established county local option as the policy of the state with respect to the manufacture of, and the traffic in, intoxicating liquors; thereby displacing the then existing policy of state-wide prohibition of the manufacture and traffic in intoxicants in this state. The Legislature of 1915 re-established the policy which the Legislature of 1911 had, as indicated, superseded by a policy founded on the preference, duly registered, of the majority of the electorate of counties holding elections to determine the county's choice in respect of the manufacture and sale of intoxicating liquors. The Legislature of 1915 dealt particularly, comprehensively, and exhaustively with the subject. It viewed the state as a unit, and sought to reduce the use or consumption of intoxicants and to promote temperance, and to suppress the evils of intemperance, by forbidding the manufacture in this state of intoxicating beverages, by prohibiting in this state traffic (with minor exceptions) therein, and by closing practically every conceivable avenue to effective evasion of the laws so designed, and by creating extraordinary remedies and processes wherewith the unlawful, prescribed traffic in intoxicants and other liquors adapted to be used as instruments of evasion of the laws might be hunted down, hindered, and destroyed. Notwithstanding the prohibition of the manufacture of and traffic in intoxicants, the laws, enacted in 1915, with equal clarity show the legislative purpose to have been and to be to unqualifiedly preserve to every adult in the state the privilege of having transported to him from another state, through

[Ward, et al. v. Markstein.]

interstate commerce, and to have possession of at one time, a limited quantity, within a prescribed period, of the liquor forbidden to be manufactured, transported, or sold in this state.—Gen. Acts 1915, p. 553, et seq; *Sou. Ex. Co. v. Whittle*, 194 Ala. 406, 69 South. 652. Not only so, but the laws excepted from their operation and effect “the social serving of such liquors or beverages [liquors or beverages not otherwise prohibited in kind and quantity] in private residences in ordinary social intercourse.”—Gen. Acts 1915, p. 2. In establishing rules of evidence to better enable the authorities to enforce the inhibitions of this system of laws the possession of intoxicants or the storing of intoxicants, within the limits of quantity prescribed, in places used exclusively as dwellings, is affirmatively excepted from having any incriminatory effect. In section 4 of the act approved September 25, 1915 (Gen. Acts 1915, p. 555), it is provided, in statement of the general policy of the state: “* * * It being the general policy of this state to require under nonprohibited conditions, that such liquors shall be delivered to and possessed by individuals only, and for personal and domestic consumption.”

In section 2 of the act approved September 25, 1915 (Gen. Acts, p. 553), it is provided: “In order to prevent frauds upon the law which have been practiced, and to assure the delivery of liquors in nonprohibited quantities, and under nonprohibited conditions by carriers, or others, to be made only to bona fide consignees, or to another upon their genuine orders,” particular provisions are made to guard against the delivery of intoxicating liquors or beverages to any person other than a bona fide consignee.

Full provision is made in this system of laws, not only for searches and seizures to discover and to appropriate contraband liquors and to abate liquor nuisances and unlawful practices in respect to forbidden liquors, but, also, for the making up and the preservation of records of liquors received in this state from carriers, and for rendering available such records in the detection and punishment of offenders and offenses. The power of this municipality to adopt the ordinance here in question is asserted to be conferred by positive provisions of law to be found in the new charter of Birmingham, approved February 28, 1899, subdivision 31 of section 25 (Local Acts 1898-99, p. 1415); in Code, §§ 1341, 1279, 1295; in Acts of Sp. Sess. 1909, pp. 174, 175;

[Ward, et al. v. Markstein.]

in Gen. Acts 1915, § 6, p. 296. The report of the appeal will contain the provisions indicated. The ordinance purports to be and is of the nature of an "inspection" ordinance, the sole purpose and effect of which is to employ that method for the detection of offenders and offenses, and to promote and effectuate the punishment of offenders, against the liquor laws of this state, appropriated and ordained by this municipality subsequent to their enactment by the Legislature of 1915, and, it may be, to deter persons within the jurisdiction of the city from offending the valid liquor laws of the state and of the municipality. By the city charter of 1899 that municipality was empowered "to provide for the inspection and gauging of liquors;" and by sections 1279 and 1295 of the Code, enacted in 1907, authority was conferred to provide for such inspection as may be deemed advisable of articles offered for sale or barter and to prohibit the gift, display, etc., of unwholesome articles of drink within the jurisdiction of the municipality.

It is manifest that the inspections contemplated by the charter provisions and by the Code provisions noted were inspections which alone intended to insure against the disposal of impure or deleterious substances or liquors, and in no sense to confer power or authority to enact ordinances to render more effective or to promote the detection, deterrence, or the punishment of offenses against laws subsequently enacted. Without assuming to say that inspections of a wider character and designed for a different purpose may not be enacted, the inspections contemplated by those provisions of law were, as the terms and time of their authorization clearly indicate, only those having the ordinary preservative and protective purposes against fraud or impositions in commercial dealings or against the impairment of the character or reputation of an article manufactured for exportation.—4 Words and Phrases, page 3658. The other provisions of law to which the municipality would attribute its authority to enact the ordinance in question are general, not specific, in their terms. The pertinent legislative enactments of 1909 and 1915—reproduced in the report of this appeal—each confine the authorization to the adoption of ordinances "not inconsistent with the laws of the state" touching the subject of intoxicants. Section 89 of the Constitution is but a restraint upon the power of the Legislature "to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state,"

[Ward, et al. v. Markstein.]

and does not limit the power of the Legislature "in conferring police power on municipal corporations."—*Ex parte Cowert*, 92 Ala. 94, 101, 9 South. 225; *Holt v. Birmingham*, 111 Ala. 369, 372, 19 South. 735. The question here presented is not one of the power of the Legislature to validly authorize municipalities to enact ordinances of this character, but is whether the ordinance under review is inconsistent with the policy of the state established by the Legislature of 1915. Is this ordinance inconsistent with the general laws, the general policy of the state as manifested by the laws enacted in 1915, governing the reception, possession, and consumption of intoxicating liquors in this state? If so, then the ordinance is void.—2 Dillon on Mun. Corp. (5th Ed.) § 601; *Dunn v. Wilcox Co.*, 85 Ala. 144, 147, 4 South. 661; *Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130. The rule is thus stated in the *Dunn Case*, *supra*: "It is, accordingly, a familiar rule on this subject that municipal by-laws and ordinances, in conflict with the general law, will be adjudged void, unless they be clearly authorized by the charter of the particular town or city enacting them."

At the citation in Dillon it is said: "The rule that a municipal corporation can pass no ordinance which conflicts with its charter, or any general statute in force and applicable to the corporation, has been before stated. Not only so, but it cannot, in virtue of its incidental power to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the state as declared in its general legislation."

(3) The requirements and regulations sought to be established by the ordinance seriously, heavily burden and charge the innocent receptor or possessor of liquors that are expressly, unqualifiedly exempted by general laws from the effects of their rules of control. These general laws unmistakably manifest, particularly through the provisions quoted ante, the policy of the state to be that to allow the unembarrassed, unimcumbered receipt, possession, and consumption of the limited quantities of intoxicants specified in those laws, coming from without this state to adults within the state, would the better serve and promote the prevalent ideas of rational progress toward the ideal of complete abstinence by the people of the state as well as the reasonable respect for and enforcement of these laws, than would be the consequence if inexorable, unqualified prohibition was the

[Ward, et al. v. Markstein.]

mandate of the police power of the state. This policy of the state is clear. May a municipality by ordinance, imposing the payment of a fee, and the exaction of the duty this ordinance undertakes to initially create, burden or embarrass the privilege which the state has left free and unqualified? Certainly the Legislature never contemplated or anticipated in any law it enacted the imposition by the municipalities of the state of the varying degrees and characters of burden of the unqualified privilege the Legislature assured to adults the recognition of the principle of this ordinance would open to the municipalities of this state. It is insisted for appellants that: "The inhibition against municipal corporations passing laws inconsistent with the general laws of the state means that such municipal corporations shall not pass laws rendering that lawful which the state law renders unlawful."

This statement of contention is taken, in substance, from the opinion of the Court of Appeals in *Ex parte Rowe*, 4 Ala. App. 254, 258, 259, 59 South. 69, where the expression appears to have been induced by considerations referable alone, to the provision of section 89 of the Constitution, to which we have already adverted, as that section was interpreted in *Ex parte Cowert*, 92 Ala. 94, 101, 9 South. 225. The assertion quoted from the brief for appellants may be sound so far as section 89 of the Constitution is concerned; but it is not supported or justified by any decision of this court, of which note is made in brief for appellants, when referred to the correct rule reproduced above from 2 Dillon, § 601. Where the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect of that subject to an effect contradictory or in qualification of the public policy so established by the state, unless there is a specific, positive, lawful grant of power by the state to the municipality to ordain otherwise; in which event the specific, positive, lawful grant is from the same source of authority that may and has expressed through legislation the policy of the state.

In our opinion Ordinance No. 345C is invalid; because it is in conflict with the policy of the state as expressed in the laws enacted in 1915, in that, the inevitable effect of the ordinance is to burden, incumber, and embarrass the privilege the Legislature assured adults in this state to receive and possess, without qualifications or burden of any character, the limited quantity of in-

[Griffin v. Dawsey.]

toxicants during a specified period. The other reasons asserted for the contention that the ordinance is invalid need not be and are not considered.

The judgment appealed from is affirmed.

ANDERSON, C. J., and MAYFIELD, SOMERVILLE, GARDNER, and THOMAS, JJ., concur.

Griffin v. Dawsey.

Bill to Cancel Mortgage.

(Decided May 18, 1916. 72 South. 32.)

Husband and Wife; Debt of Husband; Wife's Security.—The evidence examined and it is held to support a finding that the mortgage in question was not executed by the wife to secure a debt of the husband, and hence, that it was not void as in violation of § 4497, Code 1907.

APPEAL from Butler Chancery Court.

Heard before Hon. W. R. CHAPMAN.

Bill by Mary A. Griffin against S. C. Dawsey to cancel a mortgage as a cloud upon her title because given to secure a debt of the husband. From a decree dismissing the bill complainant appeals. Affirmed.

POWELL & HAMILTON, for appellant. FRONTIS H. MOORE, for appellee.

MAYFIELD, J.—This is a bill by a married woman to cancel a mortgage as a cloud on her title, on the ground that it was given to secure the debt of her husband, in violation of section 4497 of the Code. The only material disputed question is whether the debt secured was that of the husband and not that of the wife. The note and the mortgage on their face recite the debt secured to be that of both the husband and the wife. In the absence of parol proof on the subject, the writings make the debt a joint and several obligation of both. The oral testimony of the complainant and her witnesses tends to show that the debt secured was the debt of her husband, and that she signed the

[Griffin v. Dawsey.]

instruments and mortgaged her property only to secure the debt of her husband, and in violation of section 4497 of the Code. The evidence of respondent and his witnesses tends to show that the debt was primarily that of the wife, and that the husband was surety only. The chancellor found in favor of the respondent and dismissed the bill, and from the decree the complainant appeals. We confess that the record leaves the disputed question in doubt, and that much can be said arguendo in favor of each contention.

It is insisted by appellant that, as all the dealings and transactions leading up to the loan and the execution of the mortgage were had between the respondent and the husband, and as the latter and the wife had applied for a permanent and a temporary loan, this shows that the loan was made to him, and not to complainant. This fact is undisputed, and, unexplained, of course tends strongly to show that the loan was to the husband, and not to the wife. It is shown without dispute, however, that when respondent agreed to make the loan to the husband, he was under the belief that the husband owned the land mortgaged, and that he agreed to make the loan only in case the abstract showed a good title. An attorney was employed, probably by both the husband and the respondent, to make the abstract. The abstract showed no title in the husband, but showed title in the wife, and showed, moreover, that this title was incumbered by two prior mortgages which on their face showed that they were executed to secure the joint and several debts of both the husband and the wife. The attorney advised both the husband and the respondent of the condition of the title, and that the loan could not be made thereon to the husband, but could be made to the wife. The attorney testified that he advised the wife to the same effect, and that she acceded thereto; and that he, acting as attorney, drafted the papers to that end.

It is without dispute that the money borrowed was paid to the wife, or, to be exact, that the draft or check was made payable to her, and that it was indorsed by her to the bank which paid the money. This certainly made her liable as for the receipt of the money. It is also shown that a large part of the money so received was paid to a brother of complainant, in satisfaction of a note and mortgage held by him, executed by the complainant and her husband, which on their face showed a joint debt of the husband and the wife.

[Griffin v. Dawsey.]

The complainant and her witnesses say that the debt due her brother was that of her husband also, and that his mortgage was therefore void for the same reason claimed to vitiate respondent's mortgage. The other mortgage was to secure a part of the purchase price of the land, and it was canceled when the one in question was executed, but whether the money received from the respondent or any part of it went in payment of this mortgage is in dispute. It is certain, however, that the execution of the mortgage in question was the cause of removing two other mortgages from complainant's land, and that these mortgages, on their face, were valid incumbrances on the land. If it be conceded that one of these mortgages—the one to complainant's brother—was void because in violation of the statute, this respondent was not a party to the wrong, and had no knowledge thereof when he parted with his money, which went to remove the incumbrance.

It would be a great wrong to allow this complaint to take the respondent's money, and pay it to her brother in satisfaction of a mortgage which he held on her land, and then relieve her of all liability or duty in the premises by saying, with her, that while both of these mortgages on their face appeared to be valid, as a matter of fact they were void even the one to complainant's brother, because the debt secured thereby was the debt of complainant's husband and not the debt of complainant.

We do not think the fact that respondent spoke of the debt as that of the husband concludes the matter against him. In a sense it was his debt, though the loan was to the wife. If the respondent's contention is the true one, the wife was the principal and the husband was the surety, and he could be compelled to pay the whole to the respondent.

There are no disputed questions of law involved on this appeal. The dispute is purely a question of fact; hence the question must be determined by reading the transcript and analyzing the evidence. This has been done here and in the court below. And the statute provides that on appeals in cases like this the court shall consider the whole record without any presumption in favor of the finding of the chancellor. Observing this statute, we have reached the same result attained by the chancellor, and the decree appealed from must accordingly be affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Guin v. Guin, et al.]

Guin v. Guin, et al.

Bill to Enforce Trust.

(Decided May 18, 1916. 72 South. 74.)

1. **Trusts; Resulting; Time of Purchase.**—Where one person furnishes money for the purchase of land, and the title is erroneously or wrongfully taken in the name of another, the money must have been paid before or at the time of the purchase, to establish a resulting trust; "time of purchase" meaning the time of acquisition of title, legal or equitable.

2. **Same; Rights of Creditors or Purchasers; Statutes.**—Under § 3413, Code 1907, no such trust, whether implied by law, or created or declared by the parties can defeat the title of creditors or purchasers for a valuable consideration without notice, if the creditor be a creditor with a lien.

3. **Same; Resulting; Establishment Against Mortgagee; Notice; Burden.**—Where the bill is by the wife to enforce a resulting trust in land standing in the name of her husband, and is filed against the transferee of the mortgagee of the husband, the burden was on complainant to show that such mortgagee had prior notice of complainant's equitable claim, such mortgagee being a purchaser for value.

4. **Witnesses; Competency; Transaction with Deceased Agent.**—Where the bill was by the wife to establish a resulting trust in land standing in the name of the husband, and was filed against a transferee of a mortgagee of the husband, testimony of the husband that while negotiating with the mortgagee he informed the husband of the mortgagee, who was her agent in the matter, that the land in question belonged to the wife of the mortgagor, was not admissible where the husband of the mortgagor was dead. (§ 4007, Code 1907.)

APPEAL from Lamar Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by Eliza B. Guin against G. L. Guin, her husband, and others. From a decree for respondents, complainant appeals. Affirmed.

The bill alleges that Mrs. Eliza Guin gave \$85 to her husband with instructions to use it, as previously proposed by him, in the purchase of a tract of land, the deed to be made to Mrs. Guin. Her husband paid for the land with the money, but took the deed (dated November 25, 1907) to himself, which condition of the title remained unknown to the wife for several years. The bill seeks to establish a resulting trust in complainant, and to enjoin the respondent J. W. Dorroh from enforcing a mortgage on this land, which was executed jointly by the husband and wife (July

[Guin v. Guin, et al.]

24, 1908) to secure a debt of the husband, and transferred for value after maturity by the mortgagee (July 1, 1910) to said Dorroh; and, further, to enjoin the collection by said Dorroh of a judgment in tort recovered by him against the husband (August 29, 1912) upon which execution was issued and delivered to the sheriff in March, 1914. This judgment was also recorded under the statute on September 1, 1913. It appears that respondent Dorroh was without notice of complainant's alleged equity in the land until July 1, 1914, just before he bought the mortgage. It further appears from the testimony of complainant's husband that he informed the husband of Mrs. Hodge—the original mortgagee—who was acting as her agent in negotiating the loan, that the land belonged to Mrs. Guin, but that she would sign the mortgage with him. It also appears that complainant's husband verbally contracted for the purchase of this land from the owner in 1906, and took possession and made valuable improvements, but paid no part of the purchase money prior to November 25, 1907, since which time it has been their common homestead. The testimony of complainant and her husband shows that he received her money as alleged in the bill, and paid it to the grantor before and as a consideration for the execution of the deed, which he procured and made to himself in violation of his agreement and her instruction. Other than J. W. Dorroh, G. L. Guin, the husband, was made party respondent, and confessed the bill. Dorroh answered, denying the facts alleged in support of complainant's equity, and claims the right to enforce the mortgage, as purchaser, denying notice of the said equity to the mortgagee or her husband; also claims the right to enforce the judgment as a judgment lienholder without notice by a cross-bill. He prays that the land be sold by the decree of the court for the satisfaction of the mortgage and the judgment.

KELLY & YOUNG, for appellant. WALTER NESMITH, for appellee.

SOMERVILLE, J.—(1) To establish a simple resulting trust—as where one person furnishes the money for the purchase of land, and the title is erroneously or wrongfully taken in the name of another—it is well settled that the money must have been paid before or at the time of the purchase.—*Tilford v. Torrey*, 53 Ala. 120; *Preston v. McMillan*, 58 Ala. 84; *Lehman v. Lewis*, 62 Ala.

[Guin v. Guin, et al.]

129; *Long v. King*, 117 Ala. 423, 23 South. 534; *Haney v. Legg*, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81.

The "time of the purchase," however, within the operation of this rule, can only mean the time of the acquisition of the title, whether legal or equitable. Any other application of the rule would make of it a senseless technicality, and the language of the authorities does not so require.

In the present case, complainant paid the money before the purchase by her husband. for up to the time he receives the deed there had been no purchase. but only a verbal agreement, abortive in operation. and void in law.

A trust therefore resulted in favor of complainant when the real and only purchase was made on November 25, 1907; the evidence on this point being full, clear, and convincing.—*Carter v. Challen*, 83 Ala. 135, 3 South. 313.

(2) But "no such trusts, whether implied by law, or created or declared by the parties, can defeat the title of creditors, or purchasers for a valuable consideration, without notice."—Code, § 3413. This statute has always been construed as protecting only creditors with a lien.—*Preston v. McMillan*, 58 Ala. 84.

Whether by recording his judgment in September, 1913, or by placing an execution thereon in the hands of the sheriff in March, 1914, respondent Dorroh acquired a judgment lien prior to any notice to him of complainant's equity, and that equity cannot be asserted to defeat his judgment.—*Preston v. McMillan*, 58 Ala. 84, 94; *Carter v. Challen*, 83 Ala. 135, 30 South. 313; *Marshall v. Lister*, 195 Ala. 591, 71 South. 411.

(3) With respect to the mortgage in question, Dorroh's rights are of course no better than those of his transferrer, Mrs. Hodge, and the decisive question is whether Mrs. Hodge herself had prior notice of complainant's equitable claim. She being a purchaser for value, the burden was on complainant to show by satisfactory evidence that she had such notice. The only testimony offered for this purpose was that of G. L. Guin, viz., that, while negotiating for the loan, he informed Mrs. Hodge's husband—who was her agent in the matter—that the land in question belonged to his (Guin's) wife. This testimony was duly objected to by the respondent Dorroh.

(4) Our statute (Code, § 4007), making parties and interested persons competent witnesses in civil cases, expressly excepts from admissibility their testimony as to transactions with

[O'Connell v. O'Connell, et al.]

or statements by deceased persons whose estates are interested in the result of the suit, "or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto" by such opposite party.

This statute has been liberally construed as including in the class of incompetent witnesses, and also in the class of protected adversaries, those who are within the spirit and policy of the statute, though not strictly within its terms.—*White v. Thompson*, 123 Ala. 610, 26 South. 648; *Louis v. Easton*, 50 Ala. 470; *Boykin v. Smith*, 65 Ala. 294; *Hodges v. Denny*, 86 Ala. 228, 5 South. 492; *Moore v. Walker*, 124 Ala. 199, 26 South. 984.

So, this witness being clearly incompetent to so testify as against Mrs. Hodge, the original mortgagee, he must be held equally incompetent as against her transferee and successor in interest, Dorroh.

It results that, on the legal and undisputed evidence before the chancellor, he properly dismissed the original bill, and granted relief to the respondent, Dorroh, under his cross-bill.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

O'Connell v. O'Connell, et al.

Bill to Quiet Title.

(Decided May 18, 1916. 72 South. 81.)

1. Wills; Construction; Estate Devised.—A devise of real property to one without limitation or restriction vests in such one a fee simple title to the property.

2. Same; Words of Survivorship; Effect.—A testatrix had three married daughters whose husbands had not been successful from a business standpoint, an unmarried daughter, a son in ill health, and two other sons in whom she reposed confidence. She devised and provided that the real property bequeathed to each of her daughters should be held for life, with remainder over to her children, with power to sell upon the written consent of her executors, and to reinvest the proceeds on the same limitation, devised certain real estate to complainant, a son, devised to the unmarried daughter certain realty not subject to the provision as to sale, etc., provided for the

[O'Connell v. O'Connell, et al.]

son in ill health, and made a disposition of property not otherwise disposed of, specifically to her children, with the provision that her daughters should hold under the conditions of the first provision, and then made a provision that if any child died leaving child or children, such child or children should stand in the place of the parent, and if any child died intestate without issue, the property devised to him should go to his brothers and sisters or their children. The words of survivorship in the final provision were intended, therefore, to provide against the death of the objects of the gifts in the lifetime of the testatrix, and prima facie referred to her death. Hence, such provision could not cut down the fee simple estate of complainant, nor the fee simple estate of the unmarried daughter.

3. **Same; Intention of Testator.**—In the construction of a will the cardinal rule is to ascertain the intention of the testator and to give it effect if it is not prohibited by law.

4. **Same; Cutting Down Gift.**—A clear gift is not to be cut down by anything which does not indicate an intention to do so with reasonable certainty.

5. **Same; Words of Survivorship.**—Where a gift is to take effect in possession immediately upon the death of the testator, words of survivorship are regarded as intended to provide against the death of the object of the gift in the testator's lifetime, and prima facie refer to the death of the testatrix.

6. **Same; Death.**—Rules of construction are adopted as an aid to the court in ascertaining the intention of the testator where from the provisions of the will such intention is doubtful.

APPEAL from Montgomery Chancery Court.

Heard before Hon. O. S. LEWIS.

Bill by G. A. O'Connell against Alice O'Connell and others to quiet title to land. From a decree rendered, complainant appeals, with cross-appeal by one of respondents. Reversed and rendered.

The will of Lucy O'Connell as to the items mentioned is as follows:

Item 2. The property in this will given, bequeath or devised to each of my daughters shall be held as follows: The said personal property absolutely, and the real estate for and during the time of her natural life, and at her death to her children, share and share alike, but she may at any time sell or dispose of any or all of said property by and with the consent in writing of the acting executor or executors of my will, the proceeds of said sale to be paid to said executor or executors, and reinvested in such property as she may direct, to be held subject to the same limitations as the property sold, and the property so purchased may in like manner be sold, and the proceeds reinvested by the executors in other property, to be held under the same limitations, and all

[O'Connell v. O'Connell, et al.]

of the real estate or interest in real estate given to her under this will is to be held under and governed by the provisions of this item, save and except as hereinafter or expressly provided.

7. I give, devise and bequeath to my son, George A. O'Connell the following described real and personal property situated in the city or county of Montgomery, to-wit: Sixteen hundred and twenty-five dollars (\$1,625.00) of the capital stock of the First National Bank of Montgomery; the pin containing his grandfather's picture; two vacant lots numbers eleven and twelve on Godfrey street; two two-room houses on Oak street, numbers eight and nine; and the following described lot of land: Commencing at the corner of Water and Coosa streets, thence south along the west side of Coosa street one hundred (100 feet), thence west to an alley, thence north along said alley to Water street, thence east along the south side of Water street to the place of beginning, together with the use of said alley.

8. I give, devise, bequeath to my daughter Alice E. O'Connell the following described real and personal property situated in the city or county of Montgomery, to-wit: My watch and chain; my diamond ear rings; an undivided one-half interest in the lot width fifty (50) feet on the east side of Commerce street, between Tallapoosa and Water street, and extends back to an alley, together with the use of said alley, said undivided one-half interest to be given to her absolutely and not subject to the provisions of item 2 hereof; my two two-room houses on Oak street, numbers sixteen and seventeen; two vacant lots, numbers nine and ten, on Godfrey street; and the following described lot: Commencing on the west side of Coosa street, one hundred (100) feet south of Water street, thence south one hundred (100) feet, thence west to an alley, thence north along said alley one hundred (100) feet, thence east to the point of beginning, together with the use of said alley; also sixteen hundred and twenty-five dollars (\$1,650.00) of the capital stock of the First National Bank of Montgomery.

16. If any child should die, leaving a child, or children, said child or children shall stand in the place of the parent, and if any of my children should die intestate and without descendants, the property devised or bequeathed to him or her under this will shall belong to the brothers and sisters, or their descendants, of such deceased child.

[O'Connell v. O'Connell, et al.]

HILL, HILL, WHITING & STERN, for appellant. W. A. JORDAN and J. F. DILLARD, for appellee.

GARDNER, J.—This bill was filed by the appellant, G. A. O'Connell, against the appellees, his children, and cross-complainant, Alice O'Connell, his sister, to quiet title to certain real estate devised to him by his mother, Lucy A. O'Connell. The sole question for determination on this appeal is the construction of the will of Lucy A. O'Connell in so far as the same affects the parties to this cause and the property involved. The report of the case will contain items 2, 7, 8, and 16 of the will.

(1-6) It will be noted that the property devised to George A. O'Connell, appellant here, was without any limitation or restriction. This, without more, clearly vests in appellant a fee-simple title to the property. The court below, however, concluded that the provisions of item 16 limited the estate granted in item 7, and held that the complainant to the original bill owned only a life estate in the property devised to him. It is to be noted that in item 2, set out in the report of the case, it is provided that the real estate devised to the several daughters be limited to a life estate; but in items 8 of the will, containing the gift to the daughter Alice O'Connell, cross-complainant here, of an undivided one-half interest in a certain lot on the east side of Commerce street, in the city of Montgomery, the testatrix provided specifically that "said undivided one-half interest to be given to her absolutely and not subject to the provisions of item 2 hereof."

The said Alice O'Connell, being a party respondent to the original bill, filed a cross-bill seeking to have established her absolute fee-simple title to the undivided one-half interest in the lot referred to. Under the ruling of the learned chancellor, however, the provisions of item 16 cut down the fee-simple title of cross-complainant in said lot to a life estate, or, rather, to what is termed in the decree "a contingent fee." The cross-complainant therefore joins in this appeal, and assigns as error so much of said decree as limits her fee simple title. The result of the appeal therefore rests upon the construction of item 16 of the will, viewed in the light of all the other provisions and of the facts and circumstances surrounding the testatrix at the time of its execution.

Testatrix was at that time (in 1910) about 60 years of age, and had then living four daughters and three sons, all of whom

[O'Connell v. O'Connell, et al.]

were married except one daughter, Alice, and one son, Bernard. The mother is shown to have had much confidence in the judgment and business ability of her sons John and George A. O'Connell. The other son, then about 35 years old and living with his mother, had from childhood been in ill health, which to some extent affected his mind. The daughter Alice also resided with her mother. The husbands of the married daughters are shown not to have been very successful from a business standpoint. Testatrix, in the execution of the will, seems to have particularly described much of the property devised to her several children. The provisions of item 2 indicate with what care she guarded the interests of her daughters, and the evidence tends to show some basis for her solicitude. The gifts to John and George A. are absolute, without restriction or limitation. These two sons are named, with a life-long friend, as executors of the will without bond, with an express desire that they yield to her request and serve in that capacity.

In item 4 provision is made for Bernard, her afflicted son, but it is expressly provided that the property devised to him shall not be disposed of by him except by the written consent of the executors of her estate.

In item 8 the gift to Alice of an undivided one-half interest in the lot on Commerce street is absolute, and expressly exempted from the provisions of item 2.

In item 11 there is a very general disposition of her property not otherwise disposed of specifically to her children, with the express provision that her daughters shall hold their shares "under the limitations and conditions mentioned in item 2."

As has been so often said in the books, the cardinal rule and one above all others for the construction of wills, is to ascertain the intention of the testator, and give it effect if it is not prohibited by law.—*Smith v. Smith*, 157 Ala. 79, 47 South. 220, 25 L. R. A. (N. S.) 1045. The following is also a well-established rule: "A clear gift is not to be cut down by anything which does not, with reasonable certainty, indicate an intention to cut it down."—*Pitts v. Campbell*, 173 Ala. 604, 55 South. 500.

The court below seems to have rested the conclusion reached upon some of the language used in the *Smith Case*, *supra*, in regard to the rule as to survivorship. The provisions of the will, as well as the surrounding facts and circumstances of that case, were different from those here under consideration, but the

[O'Connell v. O'Connell, et al.]

rule applicable here, as stated by the court on former appeal (*Smith v. Smith*, 139 Ala. 406, 36 South. 616), was not departed from on the last appeal, as reported in 157 Ala. 79, 47 South. 220, 25 L. R. A. (N. S.) 1045. The portion of the rule as there stated here pertinent is as follows: "Where the gift is to take effect in possession immediately upon the testator's decease, words of survivorship are regarded as intended to provide against the death of the objects of the gift in the lifetime of the testator, and prima facie refer to his death."

This rule is referred to and discussed, as is also the *Smith Case*, *supra*, in the recent case of *Burleson v. Mays*, 189 Ala. 107, 118, 66 South. 36, et seq., and an examination thereof will disclose that the above-quoted rule is there recognized, and, indeed, that the conclusion here reached is amply supported by this authority. See, also, in this connection, the elaborate note to *Smith v. Smith*, *supra*, in 25 L. R. A. (N. S.) 1045.

Rules of construction are adopted as an aid to the court in ascertaining the intention of the testator where doubtful from the provisions of the will. "The intention of the testator is always the polestar in the construction of wills."

In the consideration of the will in this case it clearly appears to our minds that the testatrix was very careful to limit the estates of some of her children, particularly of her daughters, and for very good reasons, and that she was also careful to limit the power of disposition of the estate granted to the afflicted son. But to her sons John and George A., the latter being party complainant to this suit, she devised without any restriction whatever, vesting in them the fee-simple title to their shares. She had confidence in their judgment and business ability, as disclosed by the evidence in this record and her appointment of them to be executors of her will without bond. They were reasonably successful in their business affairs, and their domestic relations are shown to have been most pleasant, and each was the father of children. There was no occasion for any restriction upon their estates; the gifts to them were absolute and to take effect immediately, and, under the rules above stated, "will not be cut down by anything which does not with reasonable certainty indicate that such was the intention of the testator."

Under the rule as stated in *Burleson v. Mayra*, *supra*, the words of survivorship used in item 16 of the will must be regarded to have been intended to provide against the death of the

[Miller v. Graham.]

objects of the gifts in the lifetime of the testatrix and prima facie to refer to her death. The language used is entirely consistent with this theory, and, indeed, it is to be noted that the provisions of this term of the will merely follow the law of inheritance as to descent and distribution. We are therefore clear to the view that the language of item 16 would not have the effect to cut down the fee-simple estate of the complainant, George A. O'Connell, nor the fee-simple estate of Alice E. O'Connell in the undivided one-half interest in the lot on Commerce street devised to her absolutely in item 8 of the will.

Our conclusion therefore is that the decree of the chancellor was laid in error, and it will be here reversed, and a decree will here be rendered granting to complainant the relief prayed in the original bill, and also granting to cross-complainant the relief prayer in her cross-bill.

As the other parties to the suit are the children of complainant, George A. O'Connell, and are without a guardian, the taxation of the costs in the court below will be permitted to remain as fixed by the chancery court in its decree, and George A. O'Connell and Alice E. O'Connell will be here respectively taxed with the cost of this appeal accruing at the instance of each, for which execution may issue.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Miller v. Graham.

Bill for an Accounting, and to Enforce an Equity of Redemption.

(Decided May 11, 1916. 72 South. 87.)

1. **Usury; Contract; Obligation.**—The limit of a debtor's obligation under a usurious contract is the payment of the principal under § 4623, Code 1907.

2. **Same; Definition.**—The taking of a greater compensation than the law allows for the use of money is usury.

3. **Same; Loan Broker; Compensation.**—An agreed compensation to a loan broker for his services in procuring a loan does not affect the loan with usury.

[Miller v. Graham.]

4. Same; Pleading.—A pleading asserting usury as the basis of relief in equity or as a defense otherwise, must state the amount of the usurious interest, as well as the facts out of which the illegal exaction was made, or under which it was paid.

5. Same.—Where the bill was for equitable relief against a usurious mortgage, and alleged the principal to be the net amount received by complainant, and not that amount plus the broker's commission, the bill was not subject to demurrer on that specific ground, the complainant having fully submitted to the jurisdiction of the court, and unreservedly offered to pay whatever sum the court adjudged as her obligation.

APPEAL from Jefferson Circuit Court.

Heard before Hon. C. B. SMITH.

Bill by Mrs. Samuella J. Miller against Mrs. Ella M. Graham, to declare a mortgage on real estate usurious, to have an accounting, and to enforce the mortgagor's equity of redemption. From a decree sustaining demurrer to the bill complainant appeals. Reversed and remanded.

RICHARD B. KELLY, for appellant. HENRY UPSON SIMS, for appellee.

MCCLELLAN, J.—This is an appeal from a decree sustaining a demurrer to appellant's bill. The bill's purpose is to have a debt, secured by mortgage on real estate, declared usurious, to effect an accounting, and to enforce the mortgagor's equity of redemption. The indebtedness recited in the mortgage and secured by the mortgage is \$2,000. The averments of the bill set forth, as of fact, these material matters: That complainant employed A. L. Jemison to negotiate a loan for her, in the sum stated, on mortgage on her real estate; that, if Jemison secured for her this loan, it was agreed that he should be paid by her a compensation for the service of 5 per cent., viz., \$100; that a note for \$2,000 and mortgage to secure were made to Jemison; that the money loaned was not the money of Jemison, but he was acting for another lender; that Jemison informed oratrix's authorized representative "that it would also be necessary for her to pay interest in advance on said loan at the rate of 16 per cent."; that respondent (appellee) is now the owner of the debt and of the mortgage securing it; that "in making the said loan as aforesaid A. L. Jemison was acting for and on behalf of said Ella M. Graham, and that she knew or was informed that said Jemison was retaining 16 per cent. per annum interest on said

[Miller v. Graham.]

loan; and that the total sum received by her in consequence of the loan was \$1,580, Jemison retaining the remainder, viz., \$420. The bill avers that the sum thus received is the entire principal of the loan, and that the two sums of \$100 and \$320, or 16 per cent., represent usury from which she should be relieved. The complainant submits herself unqualifiedly to the jurisdiction of the court, and invokes the court's powers and processes to ascertain the amount she is due on the mortgage debt, offering to pay whatever is thus ascertained to be her obligation in the premises.

(1-3) Where a contract is affected with usury, the principal sum is the limit of the obligation to pay.—Code, § 4623; *Barclift v. Fields*, 145 Ala. 264, 41 South. 84. Since usury, generally speaking, is the taking of more for the use of money than the laws allow (*Darden v. Schuessler*, 154 Ala. 372, 377, 45 South. 130), and since the agreed compensation of 5 per cent. to Jemison for his services to complainant in securing the loan was not a sum deducted as for usurious interest on the loan (*Woolsey v. Jones*, 84 Ala. 88, 4 South. 190; *Darden v. Schuessler*, *supra*), it is manifest that the retention of the \$100 by Jemison under his agreement with complainant cannot be regarded as a usurious exaction with respect to this mortgage debt.

The original demurrer contained three grounds; but, the brief for appellee says, only the first ground was urged on the hearing below, the other two being waived by appellee's solicitor on that hearing. The single ground remaining, and on which the decree may rest, is this: "(1) That said bill of complaint shows that the plaintiff employed the broker Alan Jemison at a compensation of \$100 to obtain a loan for her, and that she consented that he deduct \$100 from the money received on oratrix's note for \$2,000; and yet in said bill oratrix fails to include said \$100 paid Jemison as a portion of the admitted principal of said loan which she offers to pay."

It is to be noted that this ground of demurrer complains of the bill's averments in respect of the principal, not the specification of the amount of the usurious interest. As appears from what has been said, the \$100 deducted and retained by Jemison was not interest, and not usury. Not being interest, there could be, on the facts averred, no sound reason for tolling the principal by that amount, in addition to the usurious exaction of 8 per cent. also deducted and retained.

[Miller v. Graham.]

(4) In constructing a sufficient pleading asserting usury as the basis for relief in equity or as a defense otherwise, it is necessary to state the amount thereof charged or taken, as well as the facts out of which the illegal exaction was made or under which it was paid.—*Albritton v. Lott*, 180 Ala. 33, 36, 37, 60 South. 148; *Munter v. Linn*, 61 Ala. 492, 497; *Duckworth v. Duckworth*, 35 Ala. 70, 74; 22 Ency. Pl. & Pr. p. 472. But, even if the \$100 mentioned in the demurrer is eliminated as constituting a part of the usury alleged to have been exacted and retained, the bill still carries the averment that a usurious exaction of 8 per cent. was made by the agent acting for and on behalf of the respondent.

(5) The averments of the bill, when read in the light of the rule of law before restated, distinctly show that the sum mentioned in the demurrer was not interest, was not usury. According to the obvious effect of the averments of the bill, that sum (\$100) constituted a part of the principal. So the bill was in error in asserting that the aggregate of the principal was \$1,580, instead of \$1,680. But the full submission of complainant to the jurisdiction of the court in the premises and her unrestricted offer to pay whatever sum the court ascertained to be her obligation denuded that error in the amount of the principal of any possible effect prejudicial to the respondent. If the demurrer had pointed the objection that the bill's averments misaverred the amount of the usury charged a different question would have been presented. The court erred in sustaining the single ground of demurrer not waived on the hearing. The consideration here is, of course, restricted to the single question raised by the ground of demurrer above quoted.

The decree is reversed. The cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

[Aetna Ins. Co., et al. v. Hann, et al.]

Aetna Ins. Co., et al. v. Hann, et al.

Bill to Enjoin Actions at Law.

(Decided June 1, 1916. 72 South. 48.)

1. **Subrogation; Surety; Right.**—A legal subrogation, as distinguished from conventional or contractual subrogation, does not arise until the surety has paid or offered to pay the debt for which the principal is liable to protect his own rights or interest.

2. **Same; Conventional or Contractual.**—Conventional or contractual subrogation rests upon an express contract to that effect.

3. **Same; Nature and Theory.**—Subrogation is a substitution of one creditor for another, a means whereby the equity of one debtor is worked out through the legal right of the creditor so as to force the final payment of the debt out of him or those who are primarily liable therefor, and whereby one of several debtors who pays the debt is made a creditor in lieu of the original creditor against other debtors who have not paid, to the amount paid.

4. **Same; Insurer; Action Against Party Primarily Liable.**—A bill by several insurance companies to enjoin the prosecution of several actions at law by the insured on their policy, which shows that insured has not received anything from either of the parties primarily liable, or from the insurer secondarily liable, and that he had recovered against the party primarily liable, whose appeal was then pending, but which does not show that such action was collusive or fraudulent as to the insurer because not first proceeding against the insurer, and then allowing the insurer to sue the party primarily liable in the name of the insured, did not show any right in the insurer to subrogation to the rights of the insured against the parties primarily liable.

5. **Estoppel; Inconsistent Position.**—In such a case the insured was not estopped from suing on his policies because he had sued a third party for negligence in allowing her wall to fall upon his property and destroy it, as there was no inconsistency in charging such third party with negligence in constructing her wall, and in alleging that insured's property burned while covered by the policy sued on.

6. **Judgment; Estoppel; Requisite.**—A party is not permitted in a subsequent suit to take a position conflicting with that taken by him in a former suit if such position is to the prejudice of the adverse party, but for such an estoppel to be relied upon the parties and subject matter must be the same, the point must be directly in person, and the judgment must be rendered on that point.

7. **Same; Mutuality.**—Estoppels by judgment operate mutually, and a party not bound by a judgment cannot set up that another is estopped by it.

8. **Insurance; Estoppel.**—Where a party whose property was destroyed by the negligence of a third party in constructing a wall which fell upon his property, has recovered against such third party, his recovery diminishes

[Aetna Ins. Co., et al. v. Hann, et al.]

his loss pro tanto, and his right to recover against insurer would be limited of the remainder only of the loss covered by the policy.

9. **Same; Subrogation.**—In such a case the insured, receiving the whole loss from the insurer, would hold his claim against such third party in trust for the insurer, and might sue therefor in his own name for its use, or the insurer might sue in its own name for its own use.

10. **Same; Parties Secondarily Liable.**—Before subrogation could be decreed in favor of an insurer as against one primarily liable for the loss, the insurer must have paid the insured his loss according to his policy, and thus satisfied the insured's demand against the wrongdoer.

11. **Injunction; Actions at Law; Ground.**—Where the bill was by a number of insurance companies to enjoin the insured from his prosecution of several actions at law on his policy, pending the appeal of a judgment of one primarily liable for the loss, it was not maintainable on the theory that it would prevent a multiplicity of suits, as there was but one suit against each insurer; and the fact that each of the policies provided for the apportionment of the loss among the several insurers did not constitute such a community of interests in such a matter as to give the bill equity on the ground of preventing a multiplicity of suits.

12. **Equity; Ground; Multiplicity of Suits.**—In order for a bill filed on the sole ground of preventing a multiplicity of suits to contain equity, it must show a community of interests in the subject matter of the several suits in which the several litigants are interested and a mere community of interests in the questions of law or fact involved is not sufficient.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by the Aetna Insurance Company against C. A. Hann and others to enjoin several actions at law. From a decree sustaining demurrers to the bill complainants appeal. Affirmed.

COLEMAN & COLEMAN, for appellant. PERCY, BENNERS & BURR, for appellee.

MAYFIELD, J.—Appellees brought separate actions against each of appellants on separate fire insurance policies. Appellants joined in a suit in equity against appellees to enjoin the prosecution of the several actions at law by appellees against them on the insurance policies.

The asserted equity was claimed to be based upon the fact that prior to the actions at law against appellants the appellees had brought an action in the federal District Court against a third party, one Mrs. Hudgins, to recover damages for injury to, or destruction of, the property insured by appellants, and had recovered a judgment for several thousand dollars against Mrs. Hudgins, who had appealed to the Circuit Court of Appeals to

[Aetna Ins. Co., et al. v. Hann, et al.]

have such judgment reversed, and that the case was still pending on appeal.

The chancellor sustained a demurrer to the bill, holding that the bill was without equity. From that decree complainants prosecute this appeal. The theory upon which complaints insist that their bill has equity rests upon four propositions, which are well stated by counsel for appellants in his brief. They are as follows:

"(1) The loss having been caused by the tort of Mrs. Lucy P. Hudgins, the complainants were entitled to be subrogated to the rights of the said C. Hann against Mrs. Lucy P. Hudgins. The said right having been defeated by the rendition of the judgment in the United States District Court, the cause of action against the insurance companies was thereby destroyed.

"(2) That the remedy at law was not a complete and adequate remedy.

"(3) That the said C. Hann, having asserted a claim against Mrs. Lucy P. Hudgins for damages which were the direct and proximate consequence of her negligence, and having been benefited by said claim, should in equity and good conscience be estopped from asserting the inconsistent claim against the insurance companies that the damage was a direct and proximate consequence of fire.

"(4) That equity should take cognizance of the cause, to prevent the multiplicity of suits."

In short, appellants claim that the equity of the bill depends: (1) upon the doctrine of subrogation; (2) of estoppel; and (3) of prevention of multiplicity of suits.

(1, 2) The doctrine of subrogation fails, for the reason that the right does not arise until the surety has either paid or offered to pay the debt or demand for which the principal is liable. Subrogation is either legal—that is, given by law—or arises out of convention or contract. A legal subrogation, such as is claimed here is allowed only when one in the situation of surety advances or pays money or thing of value to protect his own interests or rights; conventional or contractual subrogation rests upon an express contract to that effect.—*Bank v. Thompson*, 61 N. J. Eq. 188, 48 Atl. 333.

(3) Subrogation is a substitution of one creditor for another. One of several debtors who pays the debt is under the doctrine made a creditor, in lieu of the original creditor, to the

[Aetna Ins. Co., et al. v. Hann, et al.]

amount paid, against other debtors who have not paid. A debtor, however, cannot transpose himself into a creditor until he has paid the debt or demand or put the payee in default or wrong in not accepting or receiving payment from him. Subrogation is thus a means by which the equity of one debtor is worked out through the legal rights of the creditor. It is a mode which equity originated and works out to force the final payment of the debt by him or those who are primarily liable therefor. This court has defined it as follows: "In *Houston v. Br. Bk.*, 25 Ala. 257, it is defined as 'the substitution of a new for an old creditor,' or, in its more general sense, 'the act of putting by transfer, a person in the place of another, or a thing in the place of another thing.' By this transfer 'the new creditor is subrogated to all the rights of the original creditor.' The principle upon which the whole doctrine of subrogation not only as it is applied for the protection of sureties but as it is applied to compel him who is primarily liable or the thing which may be primarily liable to bear a burthen, to continue to bear it for the relief of him, or another thing, secondarily liable, does not depend upon contract, but has its foundation in natural justice, and is said by Chancellor Kent to be 'recognized in every cultivated system of jurisprudence.'"—*Knighton, et al. v. Curry, et al.*, 62 Ala. 404, 408.

"A surety is not entitled to subrogation until payment of the debt for which he is liable.—Brandt on Suretyship, § 261; 2 Lead. Eq. Cases. 278. But whatever discharges the principal from liability to the common creditor, and is by him accepted as a payment, will operate in favor of the surety as a payment. It is not essential that the surety should have paid money; whatever the creditor accepts as an equivalent and in satisfaction will operate as a payment."—62 Ala. 413.

(4) Here the bill shows that the common creditor, Hann, has not yet received a cent from either the principal debtor or the surety. He has had to resort to the courts, as he had a right to do, against both principal and surety; both resist payment, and deny liability. There is no claim here that the creditor, Hann, has released or proposes to release the primary debtor; he is proceeding in a lawful manner to compel payment. There is no intimation that the action against the principal is collusive or fraudulent so far as the surety is concerned. It is singular that a surety should object or complain because the creditor first tries to make

[Aetna Ins. Co., et al. v. Hann, et al.]

the principal debtor pay the debt or demand which the surety may ultimately have to pay. If the subrogation were conventional or contractual, instead of legal, the surety could compel the creditor to do what the bill shows he has voluntarily done, and of which the surety is complaining. It would certainly be very inequitable to substitute the insurance companies to the rights of the insured, against a wrongdoer, until the insurance companies pay or offer to pay the debt they contracted to pay, or until the insured has done some act of omission or commission which puts the insurance companies at a disadvantage. For the insured to voluntarily attempt, in good faith, to make the wrongdoer pay for the destruction of the property, instead of first proceeding against the insurance companies, and, after collecting from them, then allowing the insurance companies to sue the wrongdoer in the name of the insured, certainly does not appear to be the doing of a wrong to the insurance companies, but appears to us to be to their advantage, unless there be some collusion or fraud in the suit against the wrongdoer. We are, of course, treating the case only on the allegations of the bill. We do not mean to now decide that the relation of principal and surety exists in law and in fact, between appellants and Mrs. Hudgins. For the sake of the decision on demurrer we are conceding that the relation exists.

(5) The contention that appellee Hann, the insured, is estopped from suing appellants on their contracts of insurance solely by reason of the fact that he has sued Mrs. Hudgins for negligence in allowing her wall to fall upon plaintiff's property and destroy it is wholly untenable. There is no inconsistency whatever in charging that Mrs. Hudgins was guilty of negligence in constructing or maintaining a wall which fell upon and injured plaintiff's house and goods, and in alleging that plaintiff's house and goods were burned, and were therefore within the protection of the insurance policies or contracts sued upon. Both allegations may very well be true. The remedies are not at all inconsistent.

It is very true that a party is not allowed in a subsequent suit to take a position in conflict with a position taken by him in a former suit, if the latter position is to the prejudice of the adverse party, and the parties and the questions involved in the two suits are the same; but it was never supposed that the rule applied to suits or actions in which the parties and the issues

[Aetna Ins. Co., et al. v. Hann, et al.]

were not the same in the two proceedings.—10 Ruling Case Law, p. 702, and cases cited; *Boyett v. Standard Co.*, 146 Ala. 554, 41 South. 756; *Reynolds v. Roebuck*, 37 Ala. 408; Herman on Estoppel, 408. In order for an estoppel of the kind here relied upon to be applicable and effective, the parties must be the same, the subject-matter the same, the point must be directly in question, and the judgment must be rendered on that point. Any of these ingredients wanting, the defense fails. The sentence quoted above has been adopted by both text-writers and judicial tribunals, and has come to be recognized as a judicial axiom.—*Hall & Farley v. Ala. Terminal Co.*, 173 Ala. 405, 56 South. 235.

(7) Estoppels by judgment operate mutually, and a party not bound by a judgment cannot claim that another is estopped by it.—*Gwynn v. Hamilton*, 29 Ala. 236. The bill in this case shows the parties to be different, and the questions upon which the decision or judgment must rest to be different. Appellants, of course, are not bound by the judgment rendered against Mrs. Hudgins; they are strangers to it. The only possible interest they can have in it is the conditional one, that if Hann collects anything from Mrs. Hudgins for the destruction of, or injury to, the property insured, to which appellants might be subrogated, when they have paid Hann they must recover it of Hann, or, if Hann receives such funds from Mrs. Hudgins before judgment against the insurance companies, this would be availing to them as a defense in a court of law by way of set-off or recoupment. So there can be no equity in the bill on the ground of estoppel.

(8, 9) To state appellants' case most strongly for them is to say that Mrs. Hudgins is liable to Hann as principal, and appellants are liable as sureties; that is, Mrs. Hudgins' liability is primary, and the insurance companies', secondary. This liability, however, is not in the order of time, but in the order of ultimate liability. So far as the order of time is concerned, Hann may first apply to whichever parties he pleases. If, however, he first applies to Mrs. Hudgins, and she pays voluntarily, or at the end of a suit, he thereby diminished his loss pro tanto, and his right to recover against the appellants is limited to the remainder only of his loss covered by the insurance contracts. If he first applies to the insurance companies, and they pay the whole loss voluntarily or at the end of a suit, he then holds the claim against Mrs. Hudgins in trust, for the insurance companies. He may sue therefor in his own name, for the use of the insurance com-

[Aetna Ins. Co., et al. v. Hann, et al.]

panies, or the insurance companies may sue in his name for his own use.—*Hart v. Western Railway*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *Hall v. Railroad Co.*, 13 Wall. 370, 20 L. Ed. 594; *Mobile Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Southern Railway Co. v. Stonewall*, 163 Ala. 161, 50 South. 940.

(10) Before subrogation or substitution can be decreed, or the right thereto declared to exist, the insurer must have paid the insured his loss according to the contract. The latter's demand against the wrongdoer must be satisfied so as to relieve him of trouble and risk; and it is this securing of satisfaction by the insured which gives the insurer the right to be subrogated to the rights of the insured against the wrongdoer which negligently destroyed the property.

(11, 12) There is no equity in the bill on the theory that it will prevent a multiplicity of suits. Counsel for appellants concedes that this court is irrevocably committed to the doctrine that, in order for a bill to contain equity on the sole ground of preventing a multiplicity of suits, it must show a community of interest in the subject-matter of the several suits in which the several litigants are interested; that a mere community of interest in the questions of law or of fact involved is not sufficient. The mere fact that one suit in equity can be made a substitute for several actions at law is not sufficient to give equity jurisdiction for this purpose. The one suit in equity may be attended with more inconvenience, cost, and expense than the several at law.—*Roanoke Guano Co. v. Sanders*, 173 Ala. 359, 56 South. 198, 35 L. R. A. (N. S.) 491; *Southern Steel Co. v. Hopkins*, 174 Ala. 465, 57 South. 11, 40 L. R. A. (N. S.) 464, Ann. Cas. 1914B, 692; *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 South. 737. Counsel for appellants, however, does insist that this bill shows a community of interest in the subject-matter of each of the several suits. The only community of interest shown in the subject-matter is possibly in the suit of Hann against Mrs. Hudgins; and we have shown that this gives the appellants no standing in this court at this time. It will be time to consider that when Hann has collected the judgment or received something from it.

The fact that each of the insurance policies contains the usual clause providing for the apportionment of the loss among the several insurers of the property destroyed in the proportion of the amount insured by each to the total insurance does not con-

[McKenzie v. Stewart, et al.]

stitute such a community of interest in the subject-matter as to give a bill equity to prevent a multiplicity of suits. This has been held by a great number of courts and a great number of times. See *Mech. Ins. Co., et al. v. Hoover Distillery Co.*, 173 Fed. 888, 97 C. C. A. 400, 32 L. R. A. (N. S.) 940 et seq., and note thereto, which collects many of the decisions. In all of the cases in which equity has taken jurisdiction on account of such provisions in insurance policies on the same property it was at the suit of the insured, to prevent his having to bring many suits, and not at the suit of the insurance companies.

There is but one suit against each of these companies yet brought or threatened by the insured, and he has not requested the insurance companies to relieve him of the trouble and expense of suing each severally. So if any equity could exist for this purpose, it would be at the suit of appellee Hann, and not at that of the appellant insurance companies. There is no possibility of many suits against either of them.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

McKenzie v. Stewart, et al.

Bill for Specific Performance and to Satisfy Record.

(Decided May 18, 1916. 72 South. 109.)

1. **Mortgages; Payment; Agreement to Accept Specific Property.**—Where, for a valuable consideration, a mortgagee agrees to accept shares of stock in payment of the mortgage debt, a seasonable tender of such shares of stock is equivalent to a tender of the money due.

2. **Frauds; Statute; Agreement to Accept Shares of Stock.**—An agreement between a mortgagor and a mortgagee that upon the sale of the mortgaged property, the mortgagee will accept in payment of the debt shares of stock which are to be received by the mortgagor in payment of the purchase price of the land, is not within the statute of frauds, since a release would result by operation of law.

3. **Same; Note Secured by Mortgage; Modification.**—A note secured by a mortgage on real estate is a contract for the payment of money, and its terms may be modified by a subsequent oral agreement supported by a sufficient consideration.

4. **Contract; Mutuality.**—A contract between a mortgagor and a mortgagee by which a mortgagee agrees to accept payment of the mortgage debt

[McKenzie v. Stewart, et al.]

in shares of stock, is not void for want of mutuality because it does not bind the mortgagor to procure such shares of stock, if the mortgagor actually procured the stock and tenders delivery thereof.

APPEAL from Elmore Circuit Court.

Heard before Hon. W. W. WHITESIDE.

Bill by J. R. Stewart and another against J. C. McKenzie to specifically perform a contract and satisfy a mortgage record. From a decree overruling defendant's demurrer to the bill, he appeals. Affirmed.

The bill shows that respondent, McKenzie, held a mortgage on certain lands of complainant Stewart, to secure Stewart's note upon which was due a balance of \$1,500. McKenzie agreed with Stewart that, if Stewart would sell part of said land to complainant Storrs for 30 shares of stock in the Tallassee Oil & Fertilizer Company, McKenzie would accept 15 of said shares in full settlement and satisfaction of said mortgage indebtedness. Upon inquiry by Storrs as to this agreement McKenzie informed Storrs that he had so agreed with Stewart, and told Storrs to accept a deed from Stewart, and that he (McKenzie) would accept the 15 shares of said stock in full payment and satisfaction of the mortgage indebtedness, and would thereupon cancel the mortgage. Storrs thereupon consummated his purchase of the land from Stewart, received a deed, and delivered to Stewart 30 shares of such stock of the par value of \$3,000, and received possession of the land. Thereupon Stewart tendered to McKenzie 15 shares of the stock in full settlement of the mortgage indebtedness, and requested that the mortgage be canceled and delivered up, but McKenzie refused to accept the stock, and to cancel and deliver up the mortgage, and still refuses to do so. Complainant Stewart is, and has been, able, ready, and willing to deliver said stock to McKenzie as agreed, and now brings into court for disposition accordingly. Both complainants relied in good faith on respondent's agreement in the premises, but for which they would not have executed their transaction of purchase and sale. Besides the prayer for general relief, it is prayed that J. C. McKenzie specifically perform said agreement to accept 15 shares of stock in said Tallassee Oil & Fertilizer Company, in full payment and satisfaction of said mortgage, and that he be required to enter satisfaction on the margin of the record of the mortgage.

[McKenzie v. Stewart, et al.]

FRANK W. LULL, for appellant. T. G. HILYER, and HOLLEY & MORROW, for appellee.

SOMERVILLE, J.—The bill of complaint in this case is nominally one for the specific performance of the respondent's agreement to accept 15 shares of corporation stock in lieu of \$1,500 in money in satisfaction of a mortgage note for that amount. But it is, in substance and effect, a bill for redemption, and we shall so treat it.

(1) If, upon a valid consideration a mortgagee agrees with his mortgagor or his privy, to accept certain property in payment of the mortgage debt, a due and seasonable tender of the property is, of course, the equivalent of a tender of the money originally due. Such an agreement merely arms the mortgagor with an option as to the mode of payment. The real question in this case therefore is: Does the bill of complaint show a valid consideration for respondent's promise to accept the stock in lieu of the money originally due him?

(2) There is obviously no question here involving the statute of frauds, even conceding that the bill shows only a verbal agreement; for there was no agreement with respect to a conveyance of land. It is true that the result of respondent's acceptance of the stock would be the release of the land from the mortgage, but the same result would follow from his acceptance of money also; and in either case the release of the land results incidentally from the operation of law, and not from any agreement of the parties. Had respondent's agreement been to convey the land to Storrs on the consideration stated, the situation would be quite different. The agreement here shown did not change any part of a contract which the statute requires to be in writing, and hence, though merely verbal, it might become binding.—20 Cyc. 287, F; *Lehman v. Marshall*, 47 Ala. 362, 376; *Griswold v. Griswold*, 7 Lans. (N. Y.) 72.

(3) The note which this mortgage secured was an ordinary written contract for the payment of money, and, like other ordinary written contracts, its terms could be modified by subsequent parol agreement, if supported by a valid consideration.—*Langford v. Cummings*, 4 Ala. 46; 9 Cyc. 593, B.

With respect to the consideration for respondent's agreement with complainants, two questions are presented: (1) Did either any benefit move to respondent, or any detriment or dis-

[McKenzie v. Stewart, et al.]

advantage accrue to complainants? and (2) was there mutuality of obligation?

(4) Assuming for the moment the second essential, it is clear that respondent's agreement to accept the stock in payment of Stewart's debt would have been sufficiently supported by Stewart's agreement to procure and deliver the stock to respondent, and also by Storrs' agreement to furnish the stock to Stewart for that purpose. For Stewart would divest himself of a valuable asset, his land, and Storrs would part with a valuable asset, his stock—a manifest disadvantage to each, unless the stipulated part of the stock is to satisfy the debt and remove the incumbrance on the land purchased by Storrs from Stewart. But, it is said, Stewart and Storrs did not bind themselves, the one to supply, and the other to procure and deliver, the stock to respondent for the purpose stated, and hence respondent's agreement to accept it is not binding for want of mutuality of obligation.

(5) The law on this subject is well settled: "Although there is a lack of mutuality in the beginning, this may be cured by the other party subsequently binding himself also by promise or act. Thus, if A, promise B, to pay him a sum of money if he will do a particular act or make a particular promise, and B, does the act, the promise thereupon becomes binding, although B, at the time of the promise does not engage to do the act or make the promise. In the intermediate time the obligation of the promise is suspended, for until the performance of the condition of the promise there is no consideration, and the promise is nudum pactum; but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory. Therefore a contract to pay a certain sum upon the performance of certain acts by another becomes a binding obligation upon the promisor on the performance of said acts before the revocation of the contract, although it express no consideration past or present and contain no promise that such acts shall be performed."—9 Cyc. 334 (V), and cases cited.

It is simply the acceptance of an offer by the performance of the condition stipulated, which then becomes an executed consideration.

It may be that, considered merely as a bill for the specific performance of a verbal agreement of the character shown, the

[Wallace v. F. W. Cook Brew. Co., et al.]

bill of complaint here exhibited would be without equity by reason of the adequacy of legal remedies.—*Moses v. Scott*, 84 Ala. 608, 4 South. 742. But the scope of the bill must be determined by its allegations and the object sought to be attained; and, regarding it, as it patently is, as a bill for redemption of land, it contains equity, and is not subject to any of the grounds of demurrer assigned. If its allegations are supported by proof, the appropriate relief can be granted under the general prayer.

The decree overruling the demurrer will be affirmed.
Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Wallace v. F. W. Cook Brew. Co., et al.

Bill to Enjoin Enforcement of Judgment at Law.

(Decided May 11, 1916. 72 South. 93.)

1. **Execution; Relief; Statutory Remedy.**—Under § 3256, Code 1907, relief is to be administered on those equitable principles which apply to proceedings under supersedeas, or the common law writ of audita querela, and the movant is entitled to relief whenever plaintiff has no just reason to enforce his process.

2. **Same; Abuse of Process; Remedy.**—Where the authorized agent of a plaintiff obtaining a default judgment against complainant has marked the record of the judgment satisfied, thereby cancelling it, and there is nothing due on the judgment, complainant is entitled to relief not by bill in equity to enjoin the enforcement of the judgment but by motion in the lower court under the provisions of § 3256, Code 1907; the Local Acts establishing the Law and Equity Court (Local Acts 1907, p. 203, § 21), providing that nothing therein should prevent the exercise of any power conferred upon the circuit court touching final judgments.

3. **Same.**—A bill was without equity and properly dismissed where under the averments of the bill the remedy at law was plain, adequate and complete.

APPEAL from Morgan Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by Bluit P. Wallace against the F. W. Cook Brewing Company, and others, to enjoin the enforcement of a judgment at law. From a decree for respondents complainant appeals.
Affirmed.

O. KYLE, for appellant. WERT & LYNNE, for appellees.

[Wallace v. F. W. Cook Brew. Co., et al.]

GARDNER, J.—The bill in this case was filed to enjoin the enforcement of a certain judgment recovered by the respondent the F. W. Cook Brewing Company against the complainant in the law and equity court of Morgan county. The bill shows recovery of the judgment by respondent against complainant in the justice court and an appeal by the latter to the law and equity court. In the fourth paragraph it is alleged that during the pendency of said cause in the law and equity court a settlement and compromise was made between complainant and one Mulligan, who was the agent and representative of the said brewing company, a foreign corporation, Mulligan being authorized to act in the premises and to settle the suit, and that, notwithstanding the settlement, one Stout, who also claimed to be agent of said company, took judgment by default against the complainant. It is further averred in said paragraph that it was agreed between complainant and Mulligan at the time of the said settlement that the cause would be dismissed, upon which agreement complainant relied. In the seventh paragraph it is alleged that the complainant was not informed of the rendition of said judgment until more than 30 days after the same had been rendered. The fifth paragraph reads in part as follows: "Complainant avers that on the 6th day of March, 1914, after the rendition of said judgment by said Morgan county law and equity court, complainant called the attention of the said J. W. Mulligan, as agent of respondent F. W. Cook Brewing Company, to the fact that said judgment had been rendered, and the said Mulligan, as agent, * * * marked the record judgment in said Morgan county law and equity court 'Satisfied,' thereby canceling the said judgment. Complainant further avers that by reason of the said settlement with the said J. W. Mulligan as aforesaid at the time of the filing of the bill in this cause there was nothing due whatever on said judgment."

(1) It thus appears from the bill, reduced to its last analysis, that complainant's case for relief rested on the facts that the judgment was satisfied, that this satisfaction was duly entered of record, and that this cancellation was entered by one authorized to act in the premises, and that execution was issued and a levy threatened thereunder.

Section 3256, Code of 1907, provides, among other things, as follows: "The circuit court has power after final judgment * * * to secure parties or privies in their rights against any

[Wallace v. F. W. Cook Brew. Co., et al.]

oppression or abuse of execution, or other process, or upon any release, discharge, or payment after judgment."

Speaking to the question of the statutory remedy against the abuse of execution or other process issued by the circuit court, it was said in *Smith, Stewart & Co. v. Dean*, 166 Ala. 116, 52 South. 335: "It is to be administered on those equitable principles which apply to proceedings under the writ of supersedeas, and entitles the movant to relief wherever the plaintiff has no just reason to enforce the process."

And, speaking to the same subject, this court in the recent case of *Henderson v. P. & M. Bank*, 178 Ala. 422, 59 South. 494, said: "The proceeding in this state is a substitute for the ancient writ of audita querela. In the case of *Thompson v. Lassiter*, 86 Ala. 540, 6 South. 34, it is said: 'In our practice, the proceeding by supersedeas is substituted for the writ, and generally will lie in the cases in which a writ of audita querela would lie at common law. Matter which operates an equitable satisfaction of a judgment may be inquired into by this proceeding, and an execution issued to enforce the judgment may be superseded and vacated; but matters which go behind the judgment cannot be inquired into.'"

(2) In the bill it is unequivocally averred that Mulligan had full authority to act in the premises, and marked the record of said judgment as satisfied, and thereby canceled the same, and that nothing is due on said judgment. The bill therefore shows a full and complete release and discharge of the judgment, valid and binding under the averments as contained therein. We are therefore of the opinion that the remedy was not by a bill in equity, but by a motion in the law and equity court under the provisions of Code, § 3256, to prevent an abuse of process of that court.

Counsel for appellant seems to rest under the apprehension that on account of the wording of the local act of the Legislature establishing the law and equity court of Morgan county the lapse of 30 days after its rendition places a judgment beyond the control of the court for any purpose. Section 21 of the act approved February 25, 1907, establishing the Morgan county law and equity court (Local Acts 1907, p. 193), provides that after the expiration of 30 days from the rendition thereof final judgments rendered in said court shall be deemed as completely beyond the control of the court as if the term of said court had

[Betts, et al. v. Ward.]

ended at the expiration of 30 days. It is provided in said section, however, that nothing therein shall prevent parties from applying to said court for a rehearing under the statute authorizing the same, in the circuit court, nor prevent the court from the exercise of any power or jurisdiction conferred upon the circuit court touching final judgments.

The provisions of section 3256 of the Code give the circuit court power to secure parties against the abuse of process issuing from said court after final judgment, and the above-quoted provision of section 21 of the act establishing the Morgan county law and equity court was clearly designed to secure to that court this same power. There was therefore nothing in the local act which stood in the way of complainant's seeking relief in that court.

(3) The remedy at law, under the averments of the bill, being plain, adequate, and complete, the bill was without equity, and the chancellor's decree to that effect was therefore correct.—*Bolen v. Allen*, 150 Ala. 201, 43 South. 202; *Baldrige v. Eason*, 99 Ala. 516, 13 South. 74.

It becomes unnecessary, from this view of the case, to enter into any discussion of the insistence of counsel as to setting aside a judgment for fraud, etc. Several of our cases are reviewed upon this phase of the question in *Hendley v. Chabert*, 189 Ala. 258, 65 South. 993.

It results that the decree of the chancery court must be here affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Betts, et al. v. Ward.

Bill for Partition.

(Decided February 16, 1916. Rehearing denied June 1, 1916.
72 South. 110.)

1. **Contracts; Avoidance; Restitution.**—A party may not avoid a voidable contract, and at the same time enjoy the benefits derived thereunder.

2. **Partition; Agreements; Estoppel.**—Where a co-tenant demanded partition, and went into immediate and exclusive possession of the portion of

[Betts, et al. v. Ward.]

the land set apart to him by parol agreement, he and his successors in title were estopped to repudiate such agreement, or to question its validity, and their interest in the balance of the tract ceased to exist in equity.

3. **Same; Requisites.**—Actual separation of parts is not necessary to a partition, but any act of the co-tenants allotting to each the portion of the property which he can take and enjoy without interruption, is sufficient.

4. **Same.**—In a partition it is not necessary that each co-tenant take his own share in severalty, but the co-tenants may divide the land in such manner as they deem most conducive to their mutual interests, and two or more may take shares as tenants in common.

5. **Same; Ratification.**—An attempted partition originally ineffectual or voidable becomes binding by the ratification or acquiescence of all persons interested in the property.

6. **Same; Who May Attack Validity.**—A stranger cannot attack the validity of a partition between co-tenants.

7. **Same.**—A mortgagee of the undivided interest of a co-tenant cannot attack a voluntary partition fairly made between the co-tenants, unless it be tainted with fraud affecting his interest.

8. **Same; Mode of Division.**—While a partition under a voluntary agreement is not binding upon co-tenants who did not enter therein, nor upon purchasers who had no notice, yet the court will, in subsequent partition proceedings, set off the shares in accordance with the attempted partition insofar as it can do without serious injury.

9. **Same; Statutory Provision.**—Sections 5203, 5214, 5215, 5221, and 5231, Code 1907, do not authorize partition, at the suit of one holding under foreclosure of a mortgage on a portion of the tract allotted to a co-tenant by a parol partition, of the balance of the tract.

10. **Vendor and Purchaser; Bona Fide; Notice.**—Where a co-tenant after parol partition and allotment to him of his portion of the land and his assumption of immediate possession, conveyed other portions of the tract of which he was not in possession, his purchaser was charged with notice of fact sufficient to put him on inquiry that would lead to notice of the true status of the title.

11. **Same; Possession.**—Where the grantor had no title or possession of the land conveyed, his purchaser is not a bona fide purchaser for value and without notice.

12. **Same; Quit Claim Deed.**—A grantee under a quit claim deed is put on inquiry, and is not a bona fide purchaser without notice.

13. **Partition; Cross Bill.**—Where the bill avers a joint ownership of the lands, and invokes the aid of a court of equity for sale for partition, a cross bill seeking the affirmance of a prior parol partition, and the correction of the conveyances under which complainants claim, as a cloud on respondent's title, and a cancellation of other conveyances to complainant as a cloud on the title acquired by the parol partition is not subject to demurrer.

14. **Same.**—In such an action a cross bill seeking affirmance of a former parol partition, correction of conveyances under which complainant claims as a cloud on respondent's title, and a cancellation of other conveyances to complainant as a cloud on title acquired by the parol partition, sets up an independent equity which would sustain the jurisdiction of the court notwithstanding the original bill had been dismissed by complainant.

[Betts, et al. v. Ward.]

15. **Appeal and Error; Presenting Question in Lower Court; Pleading.**—Where, by sustaining demurrers to the cross bill, the court required it to be amended by striking therefrom the portions relating to conveyances of a certain tract, the question of duress in the procurement of the conveyance of such tract cannot be considered on appeal.

APPEAL from Madison Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by Robert L. Ward against Martha L. Betts and others, for a sale of land for partition. Decree for complainants and respondent appeals. Affirmed in part, and in part reversed and remanded.

DAVID A. GRAYSON, and TURNER PETTY, for appellant. LANIER & PRIDE, COOPER & COOPER, and R. E. SMITH, for appellee.

THOMAS, J.—On March 5, 1878, John L. Blair and wife conveyed to Sim Jordan the northwest quarter of the northeast quarter of section 9, township 4, range 1 west, reserving as a roadway narrow strips, 30 feet wide on the west side, and 15 feet wide on the north side thereof. It is undisputed that the mother of appellants furnished the money with which these lands were bought. On November 29, 1880, Sim Jordan and wife conveyed to the appellants and Jackson Fletcher the 40 acres in question, with the exception of said 30 feet on the west and 15 feet on the north.

Before 1890, one of the joint owners, Jackson Fletcher, becoming 21 years of age, insisted on a partition of said lands, and his portion, one-fifth, was accordingly marked off and set apart to him as 8 acres. The lines and corners thereof were fixed and he was given, and assumed, the immediate and exclusive possession of this tract. After assuming such possession, on December 28, 1891, said Fletcher and his wife mortgaged to Mary A. Murphy 6 of the 8 acres, describing this tract by metes and bounds, it being the tract now indicated on the map as "D." After this mortgage was foreclosed by Mary A. Murphy, on March 6, 1905, she and her husband made appellee a deed to said tract, describing it as: "Six acres in the southeast corner of northwest quarter of the northeast quarter of section 9, township 4, range 1 west, and more fully described as follows, to-wit: Beginning at a stake in the center of the northeast quarter of section 9, township 4, range 1 west, thence west 15.12 chains, thence

[Betts, et al. v. Ward.]

north 4 chains, thence east 15.12 chains, thence south 4 chains to beginning, containing 6 acres more or less."

These conveyances recognize the partition of the lands made at the instance of Jackson Fletcher, the allotment of his one-fifth of the same, and his conveyance of said 6-acre tract thereof according to the allotment.

(1) It is elemental that a party may not disaffirm a voidable contract and at the same time enjoy the benefits received thereunder.—*B. R., L. & P. Co. v. Hinton*, 158 Ala. 470, 475, 48 South. 546; *Snead v. Scott, et al.*, 182 Ala. 97, 62 South. 36; *Harrison v. Ala. Mid. Ry. Co.*, 144 Ala. 246, 40 South. 394, 6 Ann. Cas. 804. This rule prevails both at law and in equity.—*B. R., L. & P. Co. v. Jordan*, 170 Ala. 530, 537, 54 South. 280.

(2) Grounded on the same reasoning is our holding that, having demanded partition and gone into the immediate and exclusive possession of the portion of land set apart to him, Jackson Fletcher and the several grantees under him, or those claiming through them, are estopped to repudiate the parol agreement for the allotment, or to question its validity. This is in line with the holding of Lord Chancellor Hardwicke, in *Ireland v. Rittle*, 1 Atkyns, 541, case 256. In *Neale v. Neale*, 15 Eng. Ch. Rep. 673, the Master of the Rolls held that the parol agreement of partition was "in the nature of a family arrangement and followed by the uninterrupted several enjoyment of the portions allotted to the two brothers, respectively, in one agreement which this court will enforce." The decision was appealed from, and was affirmed by the Lord Chancellor. As long as the reason for a rule exists, so long does the rule prevail.—*Bank v. Plannett's Adm'r*, 37 Ala. 222; Cow. & H. Notes (1st pt.) 310.

In *Yarborough's Adm'r v. Avant*, 66 Ala. 526, 631, Chief Justice BRICKELL announced the same principle and cited, as authority therefor, *Hazen v. Barnett*, 50 Mo. 506; Freeman on Cotenancy and Partitions, § 402. He said: "The parol partition, accompanied by possession, not continued so long that, in a court of law, the statute of limitations would operate a bar to a real action by Yarborough, or his heirs, in which the legal estate resided, passed to Avant a mere equitable title, of which the court of law, on the trial of the real action, could take no notice. * * * A court of equity will intervene, and confirm a parol partition of lands which is founded on a valuable consideration, when it is attended by possession. * * * The court proceeds

[Betts, et al. v. Ward.]

upon the same principle on which bills of peace are entertained, quieting the enjoyment of equitable rights, establishing them by decree, and removing clouds from title."

In *Hazen v. Barnett*, *supra*, the court said: "Although it is laid down that a parol partition is good as between the parties when accompanied by possession, yet it seems to me that the equitable title only passes, which by adverse possession may ripen into a legal estate. In my opinion the plaintiffs had a right to have this parol partition confirmed by a decree vesting in them whatever title the defendant had in the premises."

The general statement of the rule in section 402 of Freeman on Cotenancy and Partition is based on Lord Chancellor Hardwicke's opinion in the *Ireland-Rittle Case*, *supra*. Mr. Freeman concludes as follows: "While the legal title might not, perhaps, be considered as passing by parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition, followed by a several possession, would leave each cotenant seized of the legal title to one-half of his allotment and the equitable title to the other half, and by a bill in chancery he could compel from his cotenant a conveyance of the legal title according to the terms of the partition."—*Tomlin v. Hilyard*, 43 Ill. 302, 92 Am. Dec. 118; *Eaton v. Tallmadge*, 24 Wis. 221; *Buzzell v. Gallagher*, 28 Wis. 678; Freeman on Cot. & Part. § 408, and authorities.

Mr. Justice SAYRE collects many authorities in *Oliver v. Williams*, 163 Ala. 376, 50 South. 937, to the effect that in ejectment a parol partition between tenants in common, followed by possession taken and retained thereunder, may be given in evidence as binding on them and as tending to show a repudiation of the other cotenants' rights, and as a claim of exclusive ownership brought actually to the knowledge of the other cotenants. He says: "The case of *Yarborough v. Avant*, 66 Ala. 526, seems to recognize, inferentially at least, that a parol partition of lands, followed by possession, continued for so long a time that the statute of limitation operates as a bar, vests in the cotenants legal title to the parts assigned to them respectively. At the common law a voluntary partition of lands could be made by parol between tenants in common."

The opinion (163 Ala. 382, 50 South. 939) closes a discussion of the American cases with these words: "Judge Freeman (section 398, Cot. & Part.) concludes it to be evident that a parol

[Betts, et al. v. Ward.]

partition of the lands of cotenants, when followed by possession taken or retained in pursuance of it, is binding upon them, is gaining rather than losing ground, and that, while there may be difference of opinion respecting the reasons on which the proposition ought to rest, practically, it makes little difference what view prevails; for under either each cotenant is entitled to retain the land so partitioned and allotted to him."—*Hollis, et al. v. Watkins*, 189 Ala. 292, 66 South. 29.

In 21 Am. & Eng. Ency. Law (2d Ed.) 1138-1141, the text is: "In equity, however, it is very generally considered that a parol partition, followed by exclusive possession in severalty and the exercise of ownership by the parties or those claiming under or through them, for a considerable time, even though not long enough for the possession to ripen into title by virtue of the statute of limitations, with the acquiescence of all concerned, will be binding upon the parties so far as to give to each cotenant the equitable title to and the right to exclusive possession of his part, and may be enforced in a court of equity on the ground that such possession and acquiescence constitute a part of the performance (*Welchel v. Thompson*, 39 Ga. 559, 99 Am. Dec. 470; *Lacy v. Gard*, 60 Ill. App. 72; *Weed v. Terry*, 2 Doug. [Mich.] 344, 45 Am. Dec. 257; *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. 881), or that the actions of the parties joining in and accepting exclusive possession under the parol partition will estop them from asserting any title or right to possession in violation of its terms."—*Whaley v. Dawson*, 2 Sch. & Lef. 367; *Berry v. Seawell*, 65 Fed. 742, 13 C. C. A. 101; *Allen v. Seawell*, 70 Fed. 561, C. C. A. 217; *Le Bourgeoise v. Blank*, 8 Mo. App. 434.

(3) Actual separation of the parts is not necessary to a partition, but an act of the co-partners allotting to each a portion of the property which he can take and enjoy without interruption is sufficient.—*Compton v. Mathews*, 3 La. 128, 22 Am. Dec. 167.

(4) It is not necessary in a partition among cotenants that each shall take his own share in severalty, but they may divide their lands in such way and manner as they deem most conducive to their mutual interests, and two or more may take shares as tenants in common.—*Folger v. Mitchell*, 3 Pick. (Mass.) 396; *Smith v. Hill*, 168 Ala. 317, 52 South. 949.

(5-7) An attempted partition, originally ineffectual or voidable, becomes valid and binding by the ratification or acqui-

[Betts, et al. v. Ward.]

escence of all the persons interested in the property.—*Simmons v. Spratt*, 26 Fla. 449, 8 South. 123, 9 L. R. A. 343; *Bacon v. Shultz*, 35 La. Ann. 1059; *Gulick v. Huntley*, 144 Mo. 241, 46 S. W. 154; *Sutton v. Porter*, 119 Mo. 100, 24 S. W. 760, 41 Am. St. Rep. 645; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Jackson v. Richtmyer*, 13 Johns. (N. Y.) 367; *Goodhue v. Barnwell*, Rice, Eq. (S. C.) 198; *Brazee v. Schofield*, 2 Wash. T. 209, 3 Pac. 265; *Walter v. Walter*, 1 Whart. (Pa.) 292. A stranger cannot attack the partition of cotenants (*Simmons v. Spratt, supra*) nor can a mortgagee of the undivided estate of a cotenant attack a voluntary partition fairly made between the cotenants if the partition be not tainted with fraud affecting his interests (*Long's Appeal*, 77 Pa. 151).

In the case before us, the mortgage to Murphy was not of an undivided interest in the lands, but of the whole interest in the 6-acre tract, of the allotment to the mortgagor of his interest in the lands; and the attack now sought to be made is not by Mrs. Murphy, the mortgagee, but by her grantee. This insistence of the appellee is untenable.

In *Long's Appeal, supra*, the court said, of the right of a mortgagee to contest a partition: "A mortgagee of an undivided estate is not entitled to be made a party to a proceeding in partition. He is not the owner of the estate, but a mere incumbrancer, who cannot claim to elect or to refuse a purport, to give security for owelty, or to do any act affecting the title or estate of his mortgagor. His estate is defeasible, and the moment his debt is paid it ceases. What sort of a decree would it be to award him the share or purport of his mortgagor until his debt should be paid? On what principle should a mere incumbrancer, whose estate is liable at any moment to be defeated, claim the right to say what share shall be taken for his mortgagor, or to refuse to take any? He cannot thus interfere with the lasting rights of the owner. How far a court would permit him to come into the proceedings to defend his interests against unfairness, and thus protect his security, is not the question. In order to be entitled to be made a party, he must have an estate, as owner, such as would confer the rights and powers of an owner. If then he cannot claim to be a party at law, he cannot object to a voluntary partition by the parties themselves. If competent they are not bound to go to law to make the partition. When partition is made the security of the mortgage follows the separation, and

[Betts, et al. v. Ward.]

attaches to the estate held in severalty. The only right the mortgagee has is to object to unfairness or fraud affecting his interest; but if the partition be fairly made, he cannot gainsay it. He loses nothing, and his security gains an advantage in being freed from the interference of cotenants."

(8) While a partition made under voluntary agreement is not binding as to cotenants who did not enter therein, nor as to purchasers who had no notice, the court will, in subsequent partition proceedings, set off the shares in accordance with the partition previously attempted, as far as this can be done without serious injury.—*McDonald v. Donaldson* (C. C.) 47 Fed. 765; *Campau v. Campau*, 19 Mich. 116; *Gates v. Salmon*, 46 Cal. 362; *Pringle v. Sturgeon*, Litt. Sel. Cas. (Ky.) 112; *High v. Tarver* (Tex. Civ. App. 1894), 25 S. W. 1098.

The foregoing authorities settle definitely that when the 8 acres were set off to Jack Fletcher at his insistence, his interest in the balance of the 40 acres ceased to exist in equity.

The 6-acre tract, indicated as "D" on the map attached to the bill, was conveyed by Jackson Fletcher to Mary A. Murphy on December 28, 1891, more than 20 years before the bill was filed in this cause, which was on December 31, 1912.—*Payne v. Ryder*, 24 Beav. 151; *Blacker v. Dunlop*, 93 Ga. 819, 21 S. E. 135; *Love v. Love*, 28 N. C. 104; *Fleming v. Kerr*, 10 Watts. (Pa.) 444.

In *Goodman v. Winter*, 64 Ala. 410, 430, 38 Am. Rep. 13, Chief Justice BRICKELL said, of possession after partition: "The partition or division simply designates the portion or share of the estate, real and personal, each devisee or legatee is entitled to hold in severalty under the will. The possession, with claim of exclusive title to the premises in controversy—exclusive, so far as the other devisees are concerned—by Mrs. Holcombe and those claiming under her, for more than 20 years, was sufficient evidence of a partition, or division, and of her title in severalty. * * * The presumption that there had been a division or partition, and the premises had been assigned to her, would arise from the length of possession."—*McArthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529; *Harrison v. Heflin*, 54 Ala. 552; *Kidd, et al. v. Borum*, 181 Ala. 144, 161, 61 South. 100, Ann. Cas. 1915C, 1226.

The presumption is indulged in furtherance of justice, but is not allowed to work injustice.—*Jones v. McPhillips*, 82 Ala. 102, 112, 2 South. 468.

[Betts, et al. v. Ward.]

The presumption of the partition and allotment of Jack Fletcher's interest in the lands must be indulged, not only in furtherance of justice, but to prevent injustice sought to be done the other former joint owners who ratified the partition on coming of age. The evidence is clear that the partition was made at the insistence of Jack Fletcher. In his testimony Fletcher tells how he insisted that his part of the land be partitioned from that of his brothers and sisters, and how his 8 acres were marked off and set apart to him in two tracts—a 2-acre tract that he conveyed to Simeon Jordan, and the 6-acre tract that he thereafter mortgaged to Murphy. He further states that after he "got the 8 acres measured off" to him he "did not ever claim any interest in the rest of the land," but "left the rest of the 40 to the other children;" that he then rented a portion of the land from the other children, that apportioned to or set apart for them; that his part of the land was measured off and allotted to him several years before he deeded the 6-acre tract thereof to Murphy; that this measurement and allotment, and his assumption of the immediate and exclusive possession thereunder, occurred about 35 years before witness was called to testify in this cause. Thus Jackson Fletcher and his grantees, and those holding under or through them, by this partition, were estopped and precluded from claiming an interest in any portion of the remaining 32 acres set apart to, and held by Martha Jordan, John Jordan, Anna Lee Jordan, and Mary Jordan, under the deed to them by Sim Jordan and wife, Mariah, of date November 29, 1880. Any other conclusion would make it possible for Jackson Fletcher to have thus received his portion by parol partition had at his insistence, and, after holding the same for a time sufficient to complete the bar of the statute, sell or dispose of it; and then, on final partition of the remainder of the lands between the joint owners attaining majority, to participate with them in such division. This is what complainant seeks to accomplish by this bill.

(9) Such a result would not be in consonance with principles of equity. Nor does our statutory provision for partition, or sale for division, lead to a contrary view. The statutes provide that partition may be had, as a matter of right, on the application of one or more of the joint owners or tenants in common (Code 1907, § 5203); that annulment may be obtained in chancery, of any partition procured by fraud or undue influence by which any

[Betts, et al. v. Ward.]

of the parties obtained an unfair allotment (Code, § 5214); that when there is a lien on the undivided interest of any of the parties, on partition the same attaches to the share assigned to such party (Code, § 5215); that the power of statutory partition conferred "does not prevent a resort to any lawful mode of obtaining partition of lands" (Code, § 5221); and that the chancery court shall have jurisdiction of partition or sale for division (Code, § 5231).

The complainant, as grantee, through and under Jackson Fletcher, seeks to hold the 6-acre tract D allotted to said Fletcher, and by him conveyed in severalty to Murphy and by Murphy conveyed in severalty to complainant (2 Bl. Comm. 179); and yet asks that a court of chancery decree a sale and division of the remaining lands of the original 40-acre tract, with permission to complainant to participate therein.—*Thompson, et al. v. Busch-Everett Co.*, 133 La. 938, 63 South. 474.

When the infant joint owners reached their respective majority, and ratified the partition, no third person could have an annulment thereof or question the sufficiency of the allotment.

(10) After this partition and allotment to Jackson Fletcher of his portion of the land, and his assumption of the immediate possession thereof, his subsequent conveyance of other tracts of this Blair 40—the northwest quarter of northeast quarter of said section 9, he not being in possession of the same—constituted notice or facts sufficient to put on inquiry that would lead to notice to subsequent purchasers of the true status of the title of the respondents.

(11) The appellee was not a bona fide purchaser without notice, since Jordan had no title to, or possession of, the land sought to be conveyed by him to appellee at the time of the conveyance.—*Smith v. Lowe*, 1 Atkins, 490, case 233; *Harris, et al. v. Carter's Adm'r, et al.*, 3 Stew. 233; *Scroggins v. McDougald, et al.*, 8 Ala. 382; *King v. Paulk*, 85 Ala. 186, 4 South. 825; *McCullars v. Reeves*, 162 Ala. 158, 50 South. 313; *Lester v. Walker*, 172 Ala. 104, 55 South. 619.

(12) A grantee of lands under a quitclaim deed is put upon inquiry, and is not a bona fide purchaser without notice.—*Tillotson v. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330; *Barclift v. Lillie*, 82 Ala. 319, 2 South. 120; *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745; *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 South. 948, 46 Am.

[Betts, et al. v. Ward.]

St. Rep. 56; *Rucker v. T. C., I. & R. R. Co.*, 176 Ala. 456, 58 South. 465.

The evidence is clear that after this partition and allotment to Jackson Fletcher of the two tracts aggregating 8 acres indicated on complainant's map attached as Exhibits D and C, said Fletcher had no further interest in the other lands in said quarter section, and could convey no title or interest therein to his grantees. The chancellor will enter a proper decree pursuant to this parol partition, and the view we have expressed, investing Martha Betts, John Jordan, Anna Lee Jordan, and Mary Robinson with the title to the tracts B, E, and F, as shown on complainants' exhibit map, or B, F, G, H, and I, as shown on respondents' exhibit map and will further enter proper decree of reformation and cancellation of the several deeds of conveyance under which complainant seeks to hold an interest as purchaser from Jackson Fletcher and Sim Jordan, of the said lots, and which are specifically pointed out in the cross-bill and the exhibits thereto, removing such cloud on the title to the said respective lots. For this purpose the cause is reversed and remanded.

The court erred in sustaining demurrer to the cross-bill. The relief sought therein was germane to the purpose of the original bill; the complainant having averred a joint ownership of the lands by purchase of Jackson Fletcher's interest, and, as such grantee, invoked the aid of a court of equity for its sale for division. The cross-bill in effect sought an affirmance of the parol partition, a correction of the conveyances under which the complainant claimed, as a cloud on respondents' title, and a cancellation of other conveyances to complainant, as a cloud on the title acquired by the parol partition of the whole tract of land, of which respondents and complainant's grantee, Jackson Fletcher, were the original joint owners.

(14) The respondents have even set up an independent equity which would have sustained the jurisdiction of the court had the original bill been dismissed by complainant.—*Etowah Min. Co. v. Wills V. Co.*, 121 Ala. 672. 25 South. 720; *Yarborough v. Avant*, *supra*; *Sims' Ch. Pr.* § 649.

Under the evidence the chancellor correctly decreed cancellation and annulment of the deed from Jackson Fletcher to Henry Fletcher, of date December 19, 1912, recorded in Deed Book 105, p. 337; and cancellation and annulment of the deed of Henry

[Johnson, et al. v. Pinckard & Lay.]

Fletcher and wife to Robert L. Ward, of date December 20, 1912, recorded in Deed Book, 106, p. 338. The decree in this respect is affirmed.

(15) The question as to duress in the procurement of the conveyances to lot A cannot be considered on this appeal. The amendment of respondent's cross-bill, by striking therefrom so much as related to tract A, was compelled by the court's ruling on demurrer. Thus was eliminated on the trial any inquiry as to the validity of the conveyances by which tract A was alleged to be held by complainant. The cause is reversed and remanded for other pleading and proof as to this lot, if so desired.

Affirmed in part, and in part reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Johnson, et al. v. Pinckard & Lay.

Bill to Cancel Deed and Mortgage.

(Decided May 11, 1916. 72 South. 127.)

1. Cancellation of Instruments; Mental Incapacity; Proof.—Since the law presumes every one sane until the contrary appears, a bill to cancel a mortgage and a deed on account of the mental incapacity of the mortgagor and grantor to execute the contract, is not sustained, where complainants made no proof of such incapacity at the time of the execution of the contract.

2. Equity; Pleading; Admissions by General Denial.—The rule that where a material matter is charged in the bill which prima facie is within the peculiar knowledge of respondent, and the answer is only a general denial, the matter so charged must be considered as admitted, has no application where the fraud charged against respondent is manifestly within complainant's knowledge.

APPEAL from Etowah Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by R. W. Johnson and another against Pinckard & Lay, and others, to cancel a mortgage and deed because of mental incapacity of the grantors. From a decree for respondents complainant appeals. Affirmed.

J. M. MILLER, for appellant. GEORGE D. MOTLEY, for appellee.

MCCLELLAN, J.—The submission of this cause in the court below was on the amended bill and on the answer, only. The

[Johnson, et al. v. Pinckard & Lay.]

decree entered by the chancellor gave effect to his conclusion that the complainants (appellants) did not discharge the burden of proof assumed by, and resting on, them under the allegations of the amended bill.

(1) The bill's object was to cancel a mortgage and a deed purporting to have been executed by R. W. Johnson and his wife, E. M. Johnson. The land was the property of R. W. Johnson. The amended bill's averments presented two theories (in the alternative, we will assume for the occasion) under which the cancellations sought were asserted to be complainants' due, viz.: (a) Mental incapacity of R. W. Johnson to enter into or to execute these contracts; and (b) undue influence imposed upon R. W. Johnson wherefrom the contracts in question resulted. Since the law presumes every one sane until the contrary appears, and since these complainants made no proof of R. W. Johnson's mental incapacity at the time of their consummation or execution of the contracts, it is manifest that the complainants were not entitled to the relief sought as upon the theory that Johnson was mentally incapacitated to contract.—*Rawdon v. Rawdon*, 28 Ala. 565; *Pike v. Pike*, 104 Ala. 642, 16 South. 689; *Stanfill v. Johnson*, 159 Ala. 546, 49 South. 223.

(2) The fact that the answer was but a general denial of the matters charged in the amended bill cannot avail the complainants. The rule—stated in *Moog v. Barrow*, 101 Ala. 209, 212, 13 South. 665, and in *Prestridge v. Wallace*, 155 Ala. 540, 544, 46 South. 970, among other decisions delivered here—that where a material matter is charged in the bill, which prima facie is within the peculiar knowledge of the respondent, and the answer is only a general denial, the matter so charged must be considered as admitted, has no application to a case where the matter charged is not within the peculiar knowledge of the respondent so charged.—*City of Mobile v. Fowler*, 147 Ala. 403, 407, 41 South. 468; *U. S. Fidelity Co. v. Pittman*, 183 Ala. 602, 607, 62 South. 784. The matters of fraud asserted against respondents by these complainants were, manifestly, known to complainants and were not matters prima facie within the peculiar knowledge of the respondents.

The decree is affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

[Mullin v. Palos Coal & Coke Co., et al.]

Mullin v. Palos Coal & Coke Co., et al.

Creditors' Bill.

(Decided May 18, 1916. 72 South. 76.)

Assignment; Benefit of Creditors; Constructive; Preference.—Under the express provisions of § 4295, a debtor's general conveyance or assignment of all of his property in payment of a pre-existing debt by which a preference was given to one or more creditors, inures to the benefit of all the creditors equally, and is in effect a general assignment for the benefit of all creditors.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Creditors' bill by John B. Mullen against the Palos Coal & Coke Company and others. From the decree holding that the conveyance was an attempt to prefer one creditor, and was a general assignment under the statute, complainant appeals. Affirmed.

BURGIN, JENKINS & BROWN, for appellant. GASTON & DRENNEN, for appellee.

MAYFIELD, J.—This is a creditor's bill, filed by appellant against appellees. The bill seeks to have the conveyance of certain coal lands set aside, on the ground that it was voluntary and void as against appellant, who was an existing creditor, or, if not voluntary, that it was made with intent to hinder, delay, and defraud the complainant. The bill also prayed for any other relief to which the complainant should appear to be entitled.

The answer denied that the conveyance was a voluntary one, or that it was infected with any fraud, actual or constructive, but alleged that the consideration paid was adequate, and was applied to the payment of an existing indebtedness which the grantor owed the Drennen Department Stores. The directors of the grantor corporation, the Palos Coal Coke Company, were practically the same as those of the Drennen Department Stores. It was also shown that the grantee, the Drennen Investment Company, was controlled by the stockholders of the other two corporations.

The chancellor granted relief under the general prayer; that is, he declared the conveyance to be, in legal effect, a general

[*Boston Shoe Shop v. McBroom Shoe Shop.*]

assignment of all the grantor's property, in payment of a pre-existing debt, and thus an attempted preference of a creditor, in the contemplation of the statute (Code, § 4295). From this decree the complainant appeals, insisting that the conveyance was absolutely void, because either a voluntary conveyance, or a conveyance made with the intent to hinder, delay, or defraud existing creditors.

A great deal of evidence was taken, and there were developed many circumstances tending to support appellant's contention that the stockholders and directors of the three corporations were practically the same persons, that the conveyance was not made direct to the creditor corporation, but to a third corporation, and that the check of the one was paid over to the other, and that the parties in interest in all, were practically the same, and that the recited consideration was concededly not the true consideration.

After a careful examination of the whole evidence, we have reached the same conclusion which the chancellor reached, that the conveyance was an attempt to prefer one creditor, through the conveyance of substantially all of the debtor's property, under the statute amounting, in effect, to a general assignment for the benefit of all the creditors.

The decree of the chancellor is therefore affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Boston Shoe Shop v. McBroom Shoe Shop.

Bill to Enjoin Use of Trade Device.

(Decided June 1, 1916. 72 South. 102.)

1. **Trade Marks and Trade Names; Imitation; Injunction.**—Equity will grant injunctive relief against those who, by imitative devices, symbols or practices seek to divert or appropriate the trade or patronage which would otherwise go to another established business, on the principle that the good will of the business is a valuable property right, and that the public, intending to patronize a particular business, ought not to be misled or deceived as to its identity.

2. **Same; Unfair Competition.**—A similarity sufficient to convey a false impression to the public mind, and of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, is sufficient to give the injured party right of redress, regard being

[*Boston Shoe Shop v. McBroom Shoe Shop.*]

had to the class of persons who purchased the particular article for consumption, and to the circumstances ordinarily attending the purchase, but without requiring a nice discrimination from the ordinary purchaser; the mere existence of differences which are patent to the observing and well informed person, does not necessarily amount to a sufficient differentiation, and similarity in the main distinguishing features will usually be sufficient to constitute infringement or unfair competition.

3. *Same; Similarity.*—The trade devices considered and it is held that respondent's trade device was designed to imitate that used by complainant, that the imitation was such as might readily deceive the average patron of complainant's business, divert some of its patronage, and was unfair competition, such as would be enjoined.

4. *Same.*—While the design is significant and may be of controlling importance in some cases, neither design nor actual fraud in such an imitation of complainant's trade device is a necessary element of the right to relief on the ground of unfair competition.

5. *Same; Deception.*—It is not necessary to show that any person had been actually deceived by respondent's mark or device on bill filed to enjoin an unfair competition.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Bill of the Boston Shoe Shop, a corporation, against the McBroom Shoe Shop, a corporation, to enjoin the use of trade devices. From a decree sustaining a demurrer and refusing the injunction, complainant appeals. Reversed, rendered, and remanded.

The bill and the devices therein alluded to are as follows: And humbly complaining, your orator represents unto your honor as follows:

First: That for some years prior to the filing of this bill and up to the time of his death a few months ago, one Reuben A. McBroom conducted in Mobile a business known as the "Boston Shoe Shop." That said McBroom died on, to-wit, the 18th day of December, 1914. The said "Boston Shoe Shop" was engaged principally in repairing shoes. That for a long time prior to and up to the time of his death the said McBroom had used extensively on his letter heads and in his advertising matter, and in other ways whereby it was brought prominently before the public, the following trade-name and design:



[Boston Shoe Shop v. McBroom Shoe Shop.]

Second. That the said Reuben A. McBroom spent considerable money in promulgating the said device or design, and that by its adoption, promulgation, and long user it had become a well known and valuable trade device.

Third. That after the death of the said McBroom, his personal representative, one Inge, who had been duly appointed by the probate court of Mobile county, and who was duly qualified as such personal representative, published in the newspapers of Mobile advertisements to the effect that said business of McBroom's including the name and good will thereof, would be sold, by sealed bids, and the same was sold in due course.

Fourth. That Leonard H. Metzger and Bertram H. Pake became the purchasers at said sale, and immediately commenced operating the said business, and continued to operate the same, and to use the name and design above described until the rights by them acquired as such purchasers aforesaid were by them assigned and made over to your orator in the early part of February, 1915, or thereabouts, and since that time your orator has continued the operation of the said business, and the use of the name thereof, and of the said device or design, and has continued to promulgate and to publish the said device or design in newspapers and otherwise.

Fifth. That the amount paid by Metzger and Pake to the personal representative of the said McBroom for the said business was \$6,251.60, which sum greatly exceeded the value of the stock in trade, fixtures, and machinery acquired by reason of the purchase; and your orator says that the said Pake and Metzger acquired the name and good will of the said business, including the sole and exclusive right to use the design hereinabove mentioned, and that your orator has acquired such right from the said Metzger and Pake.

Sixth. That the sole and exclusive right to use the said device or design was a valuable element of the name and good will of the said business, and the opportunity to acquire such right largely induced the payment of a sum greatly in excess of the actual value of the tangible property acquired in manner aforesaid.

Seventh. That the present shareholders of the defendant corporation are respectively the mother and two brothers of the said Reuben A. McBroom, and that they, or some of them, were unsuccessful bidders at the sale of the "Boston Shoe Shop" made

[Boston Shoe Shop v. McBroom Shoe Shop.]

by the personal representative of the said Reuben A. McBroom, in the manner hereinbefore described.

Eighth. That since the purchase by Metzger and Pake hereinbefore mentioned, the persons referred to in the seventh paragraph of this bill have organized the defendant company to engage, and it is now engaged, in a business similar to that of the complainant, and that the place of business of the respondents is No. 264 Dauphin street, Mobile, Ala.

Ninth. That the defendant, almost continuously since its organization, has used, and now uses, upon its letter heads, in its advertising matter, upon banners, and signs across and upon the front of its place of business, and in other ways whereby it is brought prominently before the public, the following design or devise:



Tenth. That the use by the defendant of the said design is an infringement of the rights of the plaintiffs, and that such use is unfair competition, and that it will probably result in confusion and deception of the public, to the detriment of complainant's business.

Eleventh. That complainant has heretofore requested defendant to cease its infringement upon complainant's rights in the premises, but that the defendant has ignored and disregarded such request, and continues the practices herein complained of.

Wherefore, the premises considered, your orator prays that your honor will take jurisdiction of this its bill of complaint, and that the said McBroom Shoe Shop, Incorporated, may be made a defendant to this bill, and that it may be brought into this court by appropriate process in accordance with the practice of this honorable court, and that it may be required to plead, answer, or demur to this bill within the time fixed by this honorable court.

And your orator further prays that your honor will, upon the hearing of this cause, grant unto your orator the writ of injunction of the state of Alabama, directed to the defendant herein, perpetually restraining it from:

(a) Using in its signs, banners, advertising matter, or in any other manner whereby the same may be brought before the

[Boston Shoe Shop v. McBroom Shoe Shop.]

public, any design or device in upright script similar to or identical with the complainant's design or device, hereinbefore described.

(b) Using in its signs, banners, advertising matter, or in any other manner whereby the same may be brought before the public, a design in script with the stroke or flourish beneath the same.

(c) Using in its signs, banners, advertising matter, or in any other manner whereby the same may be brought before the public, a design in script with the stroke or flourish beneath the same, having a phrase or word or words "cut in" to such stroke or flourish after the manner of complainant's design.

(d) Using in its signs, banners, advertising matter, or in any other manner whereby the same may be brought before the public, a design or device containing the phrase "We fix 'em quicker," or any similar phrase or phrases.

(e) Using in its signs, banners, advertising matter, or in any other manner whereby the same may be brought before the public, or from using in any fashion, the phrase, "We fix 'em quicker," or any similar phrase or phrases.

(f) And your orator further prays that your honor will grant unto your orator all such other, full, or different relief as it may be entitled to in the premises, and as to your honor may seem meet and just.

Hanaw & Pillans,
M. V. Hanaw,
Solicitors for Complainant.

Footnote: The defendant is required to answer all the allegations in this bill contained from paragraph 1 to paragraph II, inclusive, but not under oath; answer under oath being hereby expressly waived.

Hanaw & Pillans,
M. V. Hanaw,
Solicitors for Complainant.

HANAW & PILLANS, and M. V. HANAW, for appellant. FRANK S. STONE, for appellee.

SOMERVILLE, J.—(1) On the principle that the "good will" of a business is a valuable property right, and that the public who may intend to patronize a particular business, whether it dispenses merchandise or merely labor, ought not to be deceived

[*Boston Shoe Shop v. McBroom Shoe Shop.*]

or misled as to its identity, it is thoroughly settled, by a host of precedents, that courts of equity will grant injunctive relief against those who seek to divert and appropriate by imitative devices, symbols, or practices, the trade or patronage which would otherwise go to another established business.—*Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; *Am. Tobacco Co. v. Polacsek* (C. C.) 170 Fed. 117; *Kyle v. Perfection Mattress Co.*, 127 Ala. 39, 28 South. 545, 50 L. R. A. 628, 85 Am. St. Rep. 78, and note pages 83-125. Most of the cases in the note referred to are trade-mark cases, but the principle and policy of the protection afforded are substantially the same in cases of unfair competition.—38 Cyc. 762, 763.

(2) With respect to such imitative devices, the Supreme Court of the United States, in an opinion which has been very generally quoted, lays down a simple test: "Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress."—*McLean v. Fleming*, 96 U. S. 254, 24 L. Ed. 828.

And in applying this test, viz., the likelihood of deception of an ordinary person exercising ordinary care, as was justly observed by Lacombe, J., "regard must be had to the class of persons who purchase the particular articles for consumption, and to the circumstances ordinarily attending their purchase."—*N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869, 871, 23 C. C. A. 554, 556. Nor is "a nice discrimination to be expected from the ordinary purchaser."—*Internat. Silver Co. v. Rogers' Corp.*, 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506, 510, 3 Ann. Cas. 804.

Of course, the mere existence of differences which are patent to the observant and well informed does not necessarily amount to a sufficient differentiation, and similarity in the main distinguishing features will usually be sufficient to constitute infringement or unfair competition.—*Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270; *Pratt's Appeal*, 117 Pa. 401, 11 Atl. 878, 2 Am. St. Rep. 676; *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; 38 Cyc. 790b.

(3) Applying these principles to the case before us, we cannot avoid the prima facie conclusion that respondent's device for

[Boston Shoe Shop v. McBroom Shoe Shop.]

advertising its business and soliciting the patronage of the public was studiously designed to imitate the salient features of the device previously used by the Boston Shoe Shop; and that the imitation is of such form, appearance, and character as may readily deceive the average patron of complainant's establishment, and thus divert some of its patronage by what must be regarded as unfair competition.

Our conclusion is fully sustained and vindicated by the consensus of judicial opinion as illustrated by a great number of analogous cases: *Kyle v. Perfection Mattress Co.*, 127 Ala. 39, 28 South. 545, 50 L. R. A. 628, 85 Am. St. Rep. 78; *Weinstock v. Marks*, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; *G. G. Fox Co. v. Glynn*, 191 Mass. 344, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619; *Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904; *Lawrence Co. v. Tennessee Co.*, 138 U. S. 549, 11 Sup. Ct. 396, 34 L. Ed. 997; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Northwestern Consol. Co. v. Callam* (C. C.) 177 Fed. 786; *Mellwood Distilling Co. v. Harper* (C. C.) 167 Fed. 389; *Hansen v. Siegel Cooper Co.* (C. C.) 106 Fed. 691; *Centaur Co. v. Killenberger* (C. C.) 87 Fed. 725; *Fairbank Co. v. Bell Co.*, 77 Fed. 869, 23 C. C. A. 554; *Enoch Morgan's Sons v. Ward*, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729; *Same v. Whittier Coburn Co.* (C. C.) 118 Fed. 657; 38 Cyc. 780, note 31. See, also, Mr. Freeman's note in 85 Am. St. Rep. 83-125, on trademark cases.

An inspection of the infringed and infringing devices exhibited by the bill of complaint will illustrate the obnoxious character of the imitation complained of far better than mere verbal description can do. Doubtless the learned trial judge was misled by the obvious difference in the names "Boston Shoe Shop" and "McBroom Shoe Shop." Such a difference might, indeed, be sufficient to avoid the conclusion of unfairness, but for the fact that the business of the Boston Shoe Shop, as well as its peculiar advertising device, had for many years been associated with the name of its founder, R. A. McBroom, and hence the advertisement of a "McBroom Shoe Shop," by the same peculiar device, would bear upon its face a powerful and persuasive suggestion that the original shoe shop was now doing business under the new name—a suggestion by no means weakened by the seductive addition of a single syllable to the slogan, "We fix 'em quick." As said by Tyson, J., in *Kyle v. Perfection Mattress Co.*, 127 Ala.

[Smith, et al. v. Lambert.]

39, 51, 28 South. 545, 547 (50 L. R. A. 628, 85 Am. St. Rep. 78) : "When there is a marked similarity in the labels, signs, literature, and devices for attracting custom, but little weight is attached to precautionary differences or denials of a purpose to deceive the public."

(4) The bill does not charge in terms that the imitation of complainant's device was designed or fraudulent. But while design is significant, and may be in many cases of controlling importance, neither design nor actual fraud in such an imitation is a necessary element of the right to relief.—*C. S. Higgins, Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *Koebel v. Chicago, etc., Bureau*, 210 Ill. 176, 71 N. E. 362, 102 Am. St. Rep. 154; *Nesne v. Sumdet*, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439, 3 Ann. Cas. 30; *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658; 38 Cyc. 784, 785, and cases cited in notes 37 and 38.

(5) Nor is it necessary to show, in a bill for injunction merely, that any persons have been actually deceived.—38 Cyc. 773, and cases cited.

It results that there is equity in the bill, and the general demurrer was erroneously sustained. Let the decree of the lower court be reversed, and a decree be here rendered overruling the demurrer to the bill of complaint.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Smith, et al. v. Lambert.

Bill to Remove Administration and for an Accounting.

(Decided May 18, 1916. 72 South. 118.)

1. **Infants; Amendment; Notice.**—Under subdivision 1, Chancery Rule 44, where the bill was against the widow, minor children of her deceased husband, and the administrator of his estate, and the record fails to show the actual presence of the minors in court in person, by solicitor, or by guardian ad litem at the time of the allowance of the amendment to the bill, the rendition of a final decree thereon without notice to the minors was reversible error as to them.

2. **Equity; Pleading; Amendment; Default.**—Under subdivision 3, Chancery Rule 44, the fact that a decree pro confesso was entered did not dis-

[Smith, et al. v. Lambert.]

pense with notice provided for by the rules of chancery practice, and by §§ 3124-3128 and 3133, Code 1907, of a material amendment subsequently made changing the issue, the purpose of the bill, and the relief authorized; the only amendments authorized by Rule 44 being those applied for at the hearing.

3. **Notice; Pleading; Amendment.**—Notice is necessary to perfect every amendment of which notice is required, and without it the cause will be reversed on appeal even though the chancellor and the counsel fail to note the omission at the hearing.

4. **Same; Presumption.**—Irregularity in the notice will not be presumed where the record in a chancery case recites that notice of an amendment was given.

5. **Equity; Pleading; Amendment.**—Where no time is specified by the chancellor or the register, the entry on the register's order book does not suffice as notice of the amendment under § 3133, Code 1907

APPEAL from Coffee Chancery Court.

Heard before Hon. W. R. CHAPMAN.

Bill by Mamie Lambert against Ora Smith and others to remove an estate from the probate to the chancery court, and an accounting. From a decree for complainants respondents appeal. Reversed and remanded.

W. W. SANDERS, for appellant. J. A. CARNLEY, for appellee.

THOMAS, J.—The bill was filed on April 10, 1912, by Mamie Lambert against Ola Smith, widow of William T. Smith, deceased, and other named respondents, minor children of said decedent, and J. J. Dunnavant, as administrator of the estate of the decedent. It is averred that on September 19, 1908, J. J. Dunnavant was appointed by the probate court of Coffee county, Ala., as administrator of the estate of William T. Smith, deceased; that Dunnavant filed an inventory of the personal property of the estate, which was duly appraised and returned to said court on October 21, 1908, at the value of \$1,913.50; that there was begun in said court a proceeding to set apart \$1,000 of the insurance money and the homestead of the decedent as exempt to the widow, Ola Smith, and the minor children of the decedent, Eula, Otto, Thelma, and Ethel Smith, but that said exempt property was never so set aside; that said administrator has failed in his duties in prosecuting the due administration of the estate in the probate court, has not collected rents, nor accounted therefor, nor made any settlement of his administration. It is further averred that the real property of said estate aggregates amount 163 acres of land, of the value of \$3,000, and that it cannot be equitably

[Smith, et al. v. Lambert.]

divided or partitioned among the six joint owners without a sale thereof for division. The prayer of the bill is for the appointment of a guardian ad litem for the minor respondents, for the removal of the administration of the estate from the probate court to the chancery court of Coffee county, to require the administrator to account to the heirs of the estate for the moneys and properties coming into his hands as such administrator, for final settlement of the administration, and for a decree of sale of the property of the estate for the purpose of equitable division among the several joint owners, "after separating the amount exempt to the widow and minor children for the homestead, and the amount of personal property exempt to them out of said estate."

Demurrers filed by the respondents were overruled; and, the 30 days given for answer having elapsed without answer, a decree pro confesso was rendered against Ola Smith, the widow, and Louis Smith, an adult heir, defendants. J. J. Dunnivant, as said administrator, filed his answer. A guardian ad litem for the minor respondents was appointed and accepted the appointment. The record does not disclose an answer by such guardian ad litem for the minors, yet it is shown that such guardian ad litem entered into a written agreement as to taking testimony, and the note of submission of complainant was on answer of the guardian ad litem, J. N. Ham, for Otto, Eula, Thelma, and Ethel Smith, minors. The record further contains an interlocutory order, of date May 5, 1915, allowing complainant "to amend bill, which is done." This amendment made certain the description of the 36 acres "on south side" in the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 8, township 7, range 22, and averred that there were 163 acres, more or less, of the lands in question. It amended the second paragraph of the bill by averring that complainant and each of the children of William T. Smith "is entitled to one-sixth undivided interest in and to the said lands, subject to the lower interest in said lands of Ola Smith," and amended the fourth paragraph, by striking therefrom the averment of the failure of the administration in the administration of the estate. It amended also the prayer of the bill, by striking therefrom the qualification "that after separating the amount exempt to the widow and minor children for the homestead, and the amount of personal property exempt to them out of said estate," and by striking the prayer for an accounting and final settlement by the administrator.

[Smith, et al. v. Lambert.]

The amendment was material, substantially affecting the purpose of the bill. The consent for the amendment, the order of publication of testimony, the submission for final decree, and the rendition of that decree were of date May 5, 1915. No order was entered for notice of the amendment to be given to the adult respondents, or to the guardian ad litem for the minor respondents.

The appeal is by all of the respondents, Ola Smith, the widow, the adult heir, and the minor children, by their guardian ad litem, J. N. Ham. The several and separate assignments of error challenge the action of the chancellor in allowing a material amendment of the bill, and rendering final decree thereon, without notice to the respondents.

(1) The note of submission was by complainant alone, there being no representation of respondents at the submission. The actual presence of respondents in court, either in person, or by solicitor, or by guardian ad litem, at the allowance of the amendment, is not shown; the very submission of complainant is on the answer of the guardian ad litem for the minors, notwithstanding it is silent as to such actual presence in court and as to notice of such material amendment. The record should show an appearance, throughout the trial to the final decree, of the minor respondents.—Chancery rule 44, Code 1907, p. 1540; *Gayle v. Johnston*, 80 Ala. 395. Construing chancery rule 44 (1), Code of 1907, Chief Justice STONE said: "Rule of practice No. 47 provides that, 'where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians ad litem, at the allowance of the amendment, they shall be deemed to have notice thereof.' The amendment in this case was by interlineation in ink of a different color, and was allowed in term time, February 17, 1885. The entries on the record made at that time fail to show the defendants were actually present in court, in person or by their solicitors. The guardian ad litem for the infant answered, and the other defendants failed to answer, the amendment. On the 25th of May, 1885, a decree pro confesso was entered up by the register against the defendants, who had answered the original bill, but had failed to answer the amendment. In this decretal order, the register recites that the said defendants, Anna M., Thomas G., and Billups J. Gayle, 'were present in open court and had notice of the allowance of such amendment.' The evidence on which this recital was based is not shown by the record. As we have said, the order by which

[Smith, et al. v. Lambert.]

the amendment was allowed makes no mention of the actual presence of the defendants, either by themselves or counsel. The register could not rightfully consult his personal recollection of what had occurred, nor should he have received extrinsic evidence of the fact.—*McDougald v. Dougherty*, 39 Ala. 409, 431. There was no legal evidence that the three defendants named—the only adult defendants who had answered—were actually present in court when the amendment was allowed, and the decree pro confesso was improperly granted. This question, however, should have been raised before the chancellor, and cannot be raised here for the first time.”

The rendition of the decree without notice was reversible error as to the minor respondents.

(2) As to the respondents who were in default subdivision 3 of chancery rule 44 has application: “All parties who, at the allowance of an amendment, shall be in default, shall be deemed to have notice thereof, after a notice that the bill has been amended shall have been entered on the order book for such time as the chancellor or register may direct.”—Code 1907, p. 1540.

In *Howton, et al. v. Jordan, et al.*, 154 Ala. 428, 46 South. 234, Justice ANDERSON said: “The only amendments which are authorized under the rule without notice are those applied for at the hearing. * * * The fact that a decree pro confesso was entered did not dispense with notice of amendments subsequently made, and it was reversible error to render a decree on the amendment.”

In *McClenney v. Ward*, 80 Ala. 243, the amendment, as in the instant case, was to correct a misdescription of the land sought to be sold, and it was held a material amendment. In the amendment in the case at bar, not only was the description as to the 35-acre tract corrected, but the calling to account and final settlement of the administrator was abandoned, the prayer for separating the exemptions to the widow and minor children of homestead and personal property was stricken, and the third paragraph was amended to aver that the lands were subject to the dower right of the widow; and the amended prayer asked a sale of the lands without reference to these matters. Thus the amendments were material as to the widow and the adult and minor children of the decedent. The issue between the parties was changed, and a different relief authorized.—*Rosenau v. Powell*, 173 Ala. 123, 128, 55 South. 789; *Howton, et al. v. Jordan, et*

[Smith, et al. v. Lambert.]

al., supra; Holly v. Bass, 63 Ala. 387; *Masterson v. Masterson*, 32 Ala. 437.

(3, 4) Notice is necessary to perfect every amendment of which notice is required; and without it the case will be reversed on appeal, even though the chancellor and counsel failed to note the omission at the hearing.—*Sims' Ch. Pr.* § 235, p. 236; *Alston v. Alston*, 34 Ala. 15, 23; *Christian v. Christian*, 119 Ala. 521, 24 South. 844; *South. H. B. & L. Ass'n v. Riddle*, 129 Ala. 562, 577, 29 South. 667. If, however, the record recites that notice was given, irregularity in the notice will not be presumed.—*Berney Nat. Bank v. Guyon*, 111 Ala. 491, 505, 20 South. 520. In the *Guyon Case* the record recited: "After notice to defendant, by leave of court, complainants * * * amended their bill," etc.

In the case at bar the record is silent as to such notice, and does not disclose the actual presence of the respondents, who were not in default, either in person, or by their solicitors or guardian ad litem; and no effort to comply with subdivision 2 of rule 44, by service of notice on the resident respondents who were not in court, is shown.

(5) By chancery rule 40 it is provided that, when application for an amendment is proposed under section 3126 of the Code, the opposite party shall be served with a copy of the proposed amendment, with notice of the time when the application will be made; "but when the application is made in term time, one day's notice shall be sufficient, and when the motion to amend is made at the hearing in term time, no notice shall be necessary, but the chancellor may postpone the hearing of the motion, as justice may require. Where a defendant is in default for want of an answer, the notice will be sufficient if entered on the order book of the register, as directed by section 3133 (713) of the Code, for the number of days required by this rule." And section 3126 of the Code provides for amendments at any time before final decree, to meet any step of the evidence which will authorize relief, on such terms as the chancellor may impose, "and if an amendment be allowed at the hearing to bill or answer, the party against whom the amendment is allowed shall be entitled to a continuance as a matter of right."

When the several rules of chancery practice, and provisions of the statute as to amendments, are considered together, as providing a procedure that is expeditious, and at the same time just to the parties litigant, it cannot be maintained that a material

[Sheffield National Bank, et al. v. Corinth Bank & Trust Co.]

amendment changing the issue between the parties, together with the purpose of the bill and the relief authorized, should be made without the notice prescribed by the statute.—*McClenny v. Ward, supra; Holly v. Bass, supra; Sims. Ch. Pr. § 363.*

(6) In *Rosenau v. Powell, supra*, this court recently held that it is error to proceed to final decree against a party in default, on a bill which has been amended so as to change the issue between the parties or to authorize relief different from that prayed in the original bill, unless notice has been given to the defendant or his counsel, "or entered upon the register's order book for such time as the chancellor or register may direct." If no time is specified by the chancellor or register, the entry on the register's order book would not suffice as notice.

The decree is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Sheffield National Bank, et al. v. Corinth Bank & Trust Co.

Bill to Declare Mortgage a General Assignment.

(Decided May 11, 1916. 72 South. 127.)

1. **Assignment; Benefit of Creditors; Enforcement.**—Where a husband executed a note to his wife secured by crop mortgages which plaintiff thereafter purchased, allegations that the wife fraudulently participated in the destruction of complainant's security for such indebtedness held to show equity in a bill to declare a mortgage given by the wife to secure her pre-existing debt to be a general assignment for the benefit of all creditors under § 4295, Code 1907.

2. **Pleading; Ownership.**—A general allegation of ownership is an averment of an ultimate fact, and not a conclusion of law.

APPEAL from Colbert Chancery Court.

Heard before Hon. JAMES E. HORTON, JR.

Bill by the Corinth Bank & Trust Company against the Sheffield National Bank and others, to declare a mortgage a general assignment for the benefit of all creditors. From a decree overruling separate demurrers of respondents they appeal. Affirmed.

[Sheffield National Bank, et al. v. Corinth Bank & Trust Co.]

JOSEPH H. NATHAN, and ANDREWS & PEACH, for appellant.
KIRK & RATHER, for appellee.

MCCLELLAN, J.—The appellee, a Mississippi corporation, filed this bill against Mary M. Pride and the Sheffield National Bank. The chancellor overruled the separate demurrers of the appellants to the bill as last amended, and this is the matter for review here.

(1) The purpose of both the original and the amended bills was the same; the amended bill working no unauthorized departure from the object sought to be effected by the complainant, though materially altering, as may be done, the allegations of fact.—*Ex parte Delpey*, 188 Ala. 449, 66 South. 22; *Pitts v. Powl-edge*, 56 Ala. 147; *Ingraham v. Foster*, 31 Ala. 123. As originally constructed and as framed after final amendment, the bill sought to have declared a general assignment (Code, § 4295) a mortgage executed by Mary M. Pride to the Sheffield National Bank, conveying, it is alleged, substantially all of the mortgagor's property to secure a pre-existing debt to the bank, and to administer the trust for the benefit of all creditors of the mortgagor who would come in to share the burdens of the contest.

L. T. Pride and Mary M. Pride are husband and wife. The latter owned a tract of land in Colbert county consisting of 2,000 acres, only 700 acres of which were so improved as to be cultivated. L. T. Pride rented the land from his wife for the year 1914 for \$4,500, giving her his note in this form, aside from a waiver of exemptions: "Pride, Ala., December 30, 1913. On December 15, 1914, I promise to pay Mary M. Pride forty-five hundred dollars for rent on [of] Pride home place, containing two thousand acres. * * *"

It is alleged in the amended bill that complainant became on, to-wit, January 15, 1914, the owner of that note by purchase, as well as the owner, by purchase on or about that date, of 17 "crop mortgages" given to L. T. Pride by tenants on the farm designated in the rent note above reproduced. It is further alleged that the ownership of the rent note and of the "crop mortgages" armed the complainant with a landlord's lien on the crops grown on the place during the rental year 1914, and also liens, through the assignment of the "crop mortgages," on the parts of the crops belonging to the mortgagors on the place. It is further alleged that both the Prides and the Sheffield National Bank

[Sheffield National Bank, et al. v. Corinth Bank & Trust Co.]

concocted and effected a fraudulent design to appropriate and convert, and to divert to other purposes, these subjects of complainant's liens and, knowing complainant's reliance on L. T. Pride as its agent to conserve its rights under the liens, in the process designed and did effect the loss, by delay, by the complainant of its remedy by attachment to enforce the landlord's lien possessed by it as the owner of the rent note. It is further alleged that L. T. Pride was adjudged a bankrupt on February 8, 1915, and that on February 6, 1915, Mary M. Pride made a mortgage to secure a pre-existing debt to the Sheffield National Bank conveying her equity of redemption (two mortgages on the land of \$10,000, each being then outstanding) in the Pride home place, which was substantially all of her property; the only remaining other property belonging to her being then under mortgages for an aggregate sum equal to its value.

The theory set forth in the original bill of complainant's relation to the rent note and the "crop mortgages" would, doubtless, have brought the asserted rights of the complainant within the rule of the statute forbidding the wife to secure a debt of the husband with her property. The last amendment of the bill puts the complainant's case in very different posture. It expressed the theory that complainant was owner, by purchase, of the rent note and the "crop mortgages," and that Mrs. Pride fraudulently participated in the destruction of its rights as the owner, by purchase, of the note and mortgages. If the wrongful acts in the mind of the pleader are sufficiently averred and characterized in the amended bill, then, under the averments of the amended bill, the complainant was and is a creditor of Mrs. Pride, within our statute (*Gunn v. Hardy*, 130 Ala. 642, 651, 31 South. 443; *Dowling v. Garner*, 195 Ala. 493, 70 South. 105), and, being a creditor, the complainant's amended bill possessed equity.

(2) It is insisted that the amended bill is insufficient in respect of its omission to aver the facts constituting the passage of the right and title to the rent note from Mrs. Pride, the payee therein, to the complainant; the general allegation being that complainant is the owner of that note. While there are authorities to the contrary, our opinion is that the general allegation of ownership is an averment of an ultimate fact, and not a conclusion of law.—*Taylor v. Perry*, 48 Ala. 240, 245; 21 Ency. Pl. & Pr., pp. 718, 719.

[Birmingham R. L. & P. Co. v. Cohill.]

Our conclusion is that the decree overruling the demurrers was well rendered.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Birmingham R. L. & P. Co. v. Cohill.

Injury to Passenger.

(Decided May 11, 1916. 72 South. 126.)

1. **Appeal and Error; Review; Matters Urged Below.**—An order overruling a general demurrer which did not distinctly point out defects in the complaint will not be reversed on appeal, although such defects are there urged.

2. **Carriers; Passengers; Transfer; Refusal to Issue.**—The instructions examined and held sufficient as to damages to which a passenger is entitled, for the refusal of a street railway company to issue a transfer.

3. **Damages; Show; Instructions.**—The word "show" is equivalent to the words "reasonably satisfied" in instructing the jury as to damages which the evidence tended to show.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by Mamie Cohill against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under Acts 1911, p. 450, § 6. Affirmed.

The complaint alleges in substance, that plaintiff was a passenger on defendant's electric car, seeking passage from Broyles to East Lake, in the city of Birmingham; that it was the custom and the duty of the defendant to issue transfers from one line to a connecting line; that she requested such transfer after paying her fare on the Broyles line, to enable her to ride on the East Lake line; that it was refused; wherefore she was compelled to walk a long distance and suffered damages.

The following is charge 3 given for plaintiff: "I charge you, gentlemen of the jury, that if plaintiff was made sick and caused to relapse as the direct proximate consequence of defendant or its agents, while acting within the scope of their authority, failing or refusing to give her a transfer, then she would be entitled

[Birmingham R. L. & P. Co. v. Cohill.]

to judgment against defendant for mental and physical suffering which the evidence may tend to show.

(1) If you are reasonably satisfied from all the evidence in this case that plaintiff was a passenger of defendant on, to-wit, the 16th day of August, 1913, and, while such passenger, defendant's agents or servants, while acting within the scope of their authority, wrongfully failed to give plaintiff at her request a transfer to said East Lake car line, and that it was the duty or customary for defendant to issue said transfers if so requested by passengers, then plaintiff would be entitled to recover a judgment against the defendant for any damages which the evidence may show that she suffered.

TILLMAN, BRADLEY & MORROW, and E. CRAMTON HARRIS, for appellant. PROSCH & PROSCH, for appellee.

SAYRE, J.—(1) The complaint was perhaps defective, in that it failed to allege categorically the duty of defendant to issue a transfer, or facts from which as matter of law that duty was to be inferred. Defendant's custom may have been evidence of plaintiff's right to a transfer, but did not of itself necessarily confer that right on plaintiff. However, the grounds of demurrer here insisted upon were merely general and failed to distinctly state the objection now urged. A reversal will not be predicated on the action of the trial court in overruling them.—*Bir. Ry. v. Hatton*, 187 Ala. 573, 65 South. 934.

(2) Charge 3, given on plaintiff's request, was not all it should have been. Damages, to be awarded, should be shown to the reasonable satisfaction of the jury. But the charge in this case hypothesized as a fact that the plaintiff was made sick and caused to relapse; these expressions, construed with reference to the evidence, meaning that defendant's wrong had caused a recurrence of a malady of her female organs from which plaintiff had previously suffered. Mental and physical suffering is the common result of such injuries. The charge does not attempt to lay down any rule for the admeasurement of damages for mental suffering. It predicates plaintiff's right to such damages on proof that she was made sick and caused to relapse. The last clause of the charge disclosed a tendency to fall away from the sufficient predicate that had been previously stated, but this only introduced an element that tended in some

[Emerson v. Central of Georgia Ry. Co.]

very slight degree to confuse or mislead. The result being considered, we think there should be no reversal on that account.

(3) There was no error in giving charge 1. The criticism of this charge draws too fine a bead for practical purposes. To "show" must be accepted as the equivalent of "reasonably satisfy;" and, if defendant apprehended the award of damages not proximately caused by the wrong alleged, an explanatory charge should have been requested. We are unable to see any just grounds for such apprehension. The damages claimed were either the proximate result of the wrong alleged, or they were not suffered at all as a consequence remote or proximate. Nor was the charge faulty in allowing the jury to find from defendant's custom to issue transfers that it was its duty to issue one to plaintiff on request.—*Hatton Case, supra*. The evidence as to that was without conflict, and authorized the court to assume that plaintiff was entitled to a transfer, if she asked for it.

The case was clearly one for the jury on both of the counts submitted to them. There was no error.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Emerson v. Central of Georgia Ry. Co.

Action for Freight Undercharge.

(Decided May 18, 1916. 72 South. 120.)

1. Carriers; Goods; Freight Rate.—The general rule is that the consignee and carrier are alike charged with notice of the lawful freight rate.

2. Same.—The carrier and the shipper are alike bound by the lawful freight rate, notwithstanding mistake, inadvertence, honest agreement or good faith.

3. Same.—It is the duty of a common carrier to inform the consignee of the correct freight rate, according to the classification and rates on file respectively with the Interstate Commerce Commission, in the case of interstate shipments, and with the Railroad Commission as to intrastate shipments, and on payment or tender of the amount thus due, to deliver the freight to the consignee, on its arrival.

4. Same; Undercharges; Action.—In an action for an undercharge of freight, the published classification and rates on file with the railroad commission are admissible in evidence as showing the classification and rate for such a shipment.

[Emerson v. Central of Georgia Ry. Co.]

5. **Same.**—Under sections 5521-23, and sections 5527, 5531, 5532 and 5553-5555, and sections 7671 and 7674, and 5550, Code 1907, where it did not appear that a consignee of a horse was the owner, but the evidence tended strongly to show that he was such owner, the railroad suing for undercharges in freight was entitled to an affirmative instruction against such consignee for the difference between the freight paid, and the published rate.

APPEAL from Montgomery City Court.

Heard before Hon. C. P. MCINTYRE.

Action by the Central of Georgia Railway Company against B. F. Emerson, to recover an undercharge in freight rate. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from Court of Appeals under act creating that court.

HILL, HILL, WHITING & STERN, for appellant. STEINER, CRUM & WEIL, and W. M. BLAKEY, for appellee.

THOMAS, J.—In accordance with the agreement of parties the bill of exceptions on file is hereby established as the bill of exceptions in this cause.

Suit was brought by appellee, Central of Georgia Railway Company, against appellant, as the consignee of a horse shipped over appellee's road from Clayton to Montgomery, Ala., for an undercharge of freight.

One Smith, of Clayton, bought a horse from Emerson under a sales contract guaranteeing it "to be sound." This purchaser at Clayton discovered a defect in the horse's eyes, and subsequently reshipped the animal to Emerson over appellee's road. When this return shipment was made a bill of lading valuing the horse at \$300 was issued by appellee and delivered to Smith as consignor, and appellant was named therein as consignee. On its arrival at the point of destination appellant paid \$11.60 freight charges and received the horse. Appellee's agent at Clayton testified that he informed the shipper the true rate on such valuation, that the valuation of \$300 was fixed by the shipper's agent, and that at his request the shipment was made collect at Montgomery. The original bill of lading, having been lost before the trial, was not in evidence.

At the time of this shipment and delivery appellee's tariff, a copy of which was on file with the Alabama Railroad Commission as required by law, showed the freight charge on such an animal between said shipping points to be \$11.60 on a valua-

[Emerson v. Central of Georgia Ry. Co.]

tion of \$100, and to be \$34.80 on a valuation of \$300. The undercharge error in freight was discovered by appellee about a year later, and demand on appellant for the \$23.20 balance was made, and refused.

There was evidence that Smith and Emerson had had negotiations as to the return of the horse under the terms of its sale, but it is not averred nor proven that appellee was informed of the conditions of its reshipment, or who the real owner was, nor that appellee was so informed at the time either of the delivery or of the demand for the payment of the freight undercharge.

The pleas of the defendant were, in short, by consent, the general issue, and any matter that may be specially pleaded.

(1) A general statement of the consignee's prima facie liability is found in 2 Hutchinson, Carriers (3d Ed.) § 807, as follows: "The consignee is presumptively the owner of the goods, and is therefore prima facie liable for the freight, and, if he accepts them, the law implies a promise on his part to pay it; and such acceptance is evidence from which a jury must infer that he is the owner, and therefore bound by an implied contract to pay the freight upon them, unless such inference would be inconsistent with other facts of the case or with proof of ownership in another; and, although he be not named as consignee in the bill of lading, if he be the party for whom the goods were intended, he becomes liable for the freight as soon as they are accepted by him. But, if he is not the owner, he does not become liable from the mere fact of his being consignee, and no contract to pay the freight can be implied unless he accepts the goods; nor even then, where the consignee is known to be merely the agent of the shipper, will the law imply a promise on the part of the agent to pay the freight, though from all the circumstances of the case the jury may find that there was an implied promise.

* * *

"But the mere acceptance and removal of the goods by the consignee, with knowledge that the carrier is giving up for his benefit a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay charges beyond the amount stated."

In *Central of Georgia Railway Co. v. Southern Ferro Concrete Co.*, 193 Ala. 108, 68 South. 981, it was held that a carrier's right to collect freight undercharges on interstate shipments was properly left to the court having jurisdiction to de-

[Emerson v. Central of Georgia Ry. Co.]

clare in each case whether the consignor or the consignee is legally liable for the undercharge. From the pleading and the proof in that case it will be noted that the case is distinguishable from the instant case, in that it was there alleged and proven that "when the claim was made for the undercharge of freight," plaintiff was informed of the true contract between the defendant and the owners and shippers of the sand, "who was obligated to pay" the freights, and "who were and are entirely solvent."

(2) The general rule is that consignor, consignee, and carrier are alike charged with notice of the lawful rate.—*U. Pac. R. Co. v. Am. Smel. & R. Co.*, 202 Fed. 720, 121 C. C. A. 182; *L. & N. R. R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; *Penn. R. R. Co. v. Crutchfield*, 55 Pa. Super. Ct. 346; *N. Y., N. H. & H. R. R. v. York Co.*, 215 Mass. 36, 102 N. E. 366; *Cent. R. R. Co. of N. J. v. Mauser*, 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92; *Penn. R. Co. v. Titus*, 216 N. Y. 17, 109 N. E. 857. The transportation company and the shipper are bound by the lawful rate; no excuse which operates as an evasion of that rate is at law a defense of a proved violation of such rate. Mistake, inadvertence, honest agreement, and good faith are alike unavailable.—*Hooker v. B. & M. R.*, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669; *N. Y., N. H. & H. R. v. I. C. Com.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515; *Armour Pack. Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *N. Y. C. & H. R. R. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613; *L. & N. R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Texas & Pac. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011.

The *Titus Case*, *supra*, relied on by appellee, supports the view adopted in *Central of Georgia Railway Co. v. Southern Ferro Concrete Company*, *supra*. In *Titus's Case* it is stated that the fact of the true ownership was not "known by the plaintiff prior to said demand." Likewise, in the case of *Central Railroad Co. v. MacCartney*, 68 N. J. Law, 165, 52 Atl. 575, it was pointed out that the carrier had knowledge of the ownership of the goods by the consignor.

(3) It is the duty of the common carrier to inform the consignee of the correct amount due according to the classification and rates on file, respectively, with the Interstate Commerce Commission in the case of interstate shipments and with the

[Emerson v. Central of Georgia Ry. Co.]

Railroad Commission of the state as to intrastate shipments, and upon payment or tender of the amount due according to such classification and rates to deliver the freight upon its arrival to the consignee.

(4) The published classification and rates on file with the Railroad Commission were properly introduced in evidence as showing the classification and rate for the shipment in question.

(5) The statute is imperative that the schedule of established rates, fares, and charges be filed by the common carrier with the Railroad Commission (Code, §§ 5521-5523, inclusive); that the carrier is prohibited from charging any other rates or amounts than those so specified in such schedules and schedules of joint rates as may from time to time be lawfully in force (section 5527), and may not discriminate (sections 5531, 5532), and that recovery may be had for overcharges, penalties, and forfeitures (sections 5553-5555). And the making of overcharges, the receiving of rebates, the granting of discriminations knowingly, in respect to transportation by railroad companies or common carrier, are made misdemeanors (sections 7671, 7674).

It is by section 5550 of the Code provided also that common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, "provided the rate stipulated therein be in conformity with the classifications and rates made and filed with the Interstate Commerce Commission, in case of shipment from without the state, and with those filed with or established or approved by the Railroad Commission of the state, or those established by statute, in case of shipments wholly within the state. * * *"

It is then clear that by section 5550 of the Code, as well as by the decision of *Southern Railway Company v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936, the carrier's claim is for the amount fixed by the lawful classification and rates in force at the time the shipment was made.

From the evidence in the case at bar it does not appear that the carrier knew that the consignee was not the owner of the house; but the evidence strongly tends to show him to have been the owner. On this evidence the affirmative charge was properly given for plaintiff.

The case is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

[Commercial Finance Co. v. Cooper Bros.]

Commercial Finance Co. v. Cooper Bros.

Assumpsit.

(Decided April 13, 1916. 71 South. 684.)

1. **Evidence; Contract of Sale; Fraud.**—Where the action was for goods sold under a contract, and the testimony showed that the contract as signed by the buyer was not the one made by him, but was signed upon the misrepresentation of the agent of the seller, testimony of the buyer as to what articles he contracted to purchase was relevant in connection with the other evidence going to show that the contract signed did not speak the truth; so also was the testimony of the witness who was present at the trade admissible as corroborative of that of the buyer.

2. **Contracts; Rescission; Fraud.**—A contract executed by one in reliance upon false representation as to its contents is not binding upon the party deceived, if he elects to avoid it, notwithstanding he could read, and had an opportunity to read before signing it, since the party asserting facts cannot complain that the other took him at his word.

APPEAL from Talladega City Court.

Heard before Hon. MARION H. SIMS.

Assumpsit by the Commercial Finance Company against Cooper Bros., a partnership. Judgment for defendant, and plaintiff appeals. Transferred from the Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

The action was for goods, wares, and merchandise sold under a contract in writing for the sale of certain chinaware. The defendants set up the failure of consideration, in that plaintiff's agent represented the assortment to contain certain articles which are set out in the plea, but that plaintiff did not and has not complied with the contract, but has shipped defendants other and wholly different articles of property from that purchased, and that defendants had refused said crockery, and notified plaintiff that same was held subject to its order. Other pleas set up the same statement of facts with the additional allegation that the crockery had been returned. Others set up false and fraudulent representation by plaintiff's agent Brown inducing the signing of the contract without reading it, on the belief that said representations are true, and that upon the discovery of the fraud the contract was promptly rescinded, and the property offered to be returned. Plaintiff set up by way of replication that defendants

[Commercial Finance Co. v. Cooper Bros.]

agreed in said contract that there was no other contract of any kind, verbal or written, except the one sued on, and that defendants agreed in said contract to accept the goods as their property when shipment was made.

GRAVES EMBRY, for appellant. CARL C. SMITH, for appellee.

ANDERSON, C. J.—(1, 2) It is, no doubt, true that W. E. Cooper had no right to testify as to what articles he bought if the contract contained the true articles and was such a contract as was binding upon Cooper Bros.; but the defendants' evidence shows that the contract signed was not the one made by the defendants, and was signed upon the misrepresentation of the salesman Brown; therefore the witness W. E. Cooper had the right to tell what articles he purchased, and Brown represented to him that the contract covered said articles instead of the ones shipped. A contract executed by one in reliance upon false representations as to its contents is not binding upon the party deceived if he elects to avoid it, although he could read and had an opportunity to read the said contract before signing same.

"A party asserting facts cannot complain that the other took him at his word."—*Shahan v. Brown*, 167 Ala. 534, 52 South. 737; *Moline Jewelry Co. v. Crew*, 171 Ala. 415, 55 South. 144.

The trial court did not err in permitting W. E. Cooper to testify what articles he contracted to purchase, which was relevant in connection with the other evidence going to show that the contract signed did not speak the truth and was not binding upon the defendants. For the same reason there was no error in admitting the showing of the witness Mitchell, who heard the trade between Cooper and the salesman Brown, and who corroborated W. E. Cooper.

The trial court did not err in the conclusion upon the facts, as the defendants' evidence, which was practically uncontradicted, showed that the contract was not the one they made, and was not therefore binding, and they did nothing to estop themselves from setting up its invalidity by retaining the goods or otherwise.

The judgment of the city court is affirmed.
Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

[Searcy, et al. v. Cullman County.]

Searcy, et al. v. Cullman County.

Assumpsit.

(Decided April 13, 1916. 71 South. 664.)

1. **Counties; Treasurer's Bond; Statute.**—The fact that the county treasurer's bond was made payable to the state of Alabama instead of to the particular county, was of no importance or bearing in the county's action on the bond.

2. **Same; Obligation; Special Fund.**—Considering §§ 210-211, 1500, Code 1907, where the treasurer subsequently received and misappropriated money from a special fund derived from the sale of county bonds, for the construction and maintenance of public roads, the action being by the county against the treasurer and his sureties on his general official bond, it is held that §§ 210 and 1500 are in *pari materia*, and must be considered in view of that relation, that the surety's obligation included the assurance of his fidelity with respect to the special fund, and that the term "additional" meant "supplemental," though an additional bond would not supersede the original bond or minimize the surety's obligation thereon.

APPEAL from Cullman Circuit Court.

Heard before Hon. ROBERT C. BRICKELL.

Suit by the county of Cullman against J. J. Searcy and others, sureties upon his general official bond, as county treasurer. Judgment for plaintiff and defendants appeal. Affirmed.

GEORGE H. PARKER, and EYSTER & EYSTER, for appellant.
A. A. GRIFFITH, F. E. ST. JOHN, and CALLAHAN & HARRIS, for appellee.

MCCLELLAN, J.—(1, 2) The county of Cullman instituted this action against the county treasurer and the sureties on his general official bond to recover a sum of money—received and afterwards misappropriated by the county treasurer—derived from the sale of county bonds authoritatively issued and sold for the purpose of affording funds wherewith to construct and maintain public roads.—Code, § 158 et seq. The bond of the treasurer was incorrectly made payable to the state of Alabama, instead of to the county of Cullman; but, in view of the statutes, this error is of no importance or bearing.—*U. S. F. & G. Co. v. Union Trust Co.*, 142 Ala. 532, 38 South. 177; *Barnes v. Hudman*, 57 Ala. 504. The single question presented is whether the obliga-

[Searcy, et al. v. Cullman County.]

tion assumed by the sureties on the general official bond of the county treasurer included the assurance of that official's fidelity with respect to the special fund belonging to the county and received by him subsequent to the execution of the general official bond on which this action is founded.

Section 210 of the Code provides: "Before entering on the duties of his office he must give bond, with at least two good and sufficient sureties, in double the estimated amount of the annual revenue of the county, to be determined by the court of county commissioners, payable to the county and conditioned as prescribed by law, which bond is to be approved by the judge of probate and filed and recorded in his office; and the court of county commissioners shall require an additional bond whenever any special fund is to be received by the treasurer, and pay the premium therefor."

So far as presently important, Code, § 1500, provides: "Every official bond is obligatory on the principal and sureties thereon—(1) For every breach of the condition during the time the officer continues in office, or discharges any of the duties thereof. (2) For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein. (3) For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

Section 211 of the Code provides: "It is the duty of the county treasurer—(1) To receive and keep the money of the county, and disburse the same according to law."

The receipt by the treasurer of the special fund here involved had the effect to impose upon that official the obligations of fidelity which the law manifestly exacted of him in respect of funds belonging to the county.—*Jackson County v. Derrick*, 117 Ala. 348, 23 South. 193.

Sections 210 and 1500 are in *pari materia*, and must be construed in view of that relation. The bond, for the breach of which this action was instituted, was intended by the obligors to be and it was an official bond; and the official acted and was, when the default occurred, acting as county treasurer. The statutory condition that the official would faithfully discharge the duties of his office was of the essence of the obligation as-

[Searcy, et al. v. Cullman County.]

sumed by the obligors on his bond.—Code, §§ 1483, 1500; *U. S. F. & G. Co. v. Union Trust Co.*, 142 Ala. 538, 38 South. 177. That the faithful safe-keeping of and accounting for the special fund in question was of his official duties is manifest. His lawful, official reception of the special fund was not conditioned upon the requirement, or the execution, of an additional bond—a statutory status vitally different from that found to exist in the case of *Morrow v. Wood*, 56 Ala. 1, where the lawful official reception of the fund there in question was expressly conditioned upon the antecedent execution of the bond prescribed by the act, and the assurance that bond was held to afford was restricted by the duties prescribed by the act approved April 19, 1873. The decision in *Morrow v. Wood*, *supra*, is not a governing authority on the inquiry presented by this appeal.

Setcion 210, in its last provision, prescribed the exaction of an additional bond under defined circumstances, viz., when a special fund was to be received by the official. The term “additional,” as there employed, means supplemental. Such an additional bond does not, when given, supersede the original bond or minimize its obligations so far as the sureties on the original bond are concerned. The defined (section 210) circumstances under which the court of county commissioners is commanded by the statute to exact the additional bond but served to fix the occasion when the additional bond should be required, and not to make the requirement, or execution, of the additional bond a condition to the lawful reception of any special fund belonging to the county, for the disposition of which the law did not make other provision. Being an official bond, so intended by the obligors and the tenure of office taken under its sanction, the provisions of section 1500 effected to impose on the obligors on the general bond the obligations to answer for the full penalty of the bond (section 1504) for “every breach of the condition during the time the official continues in office, or discharges any of the duties thereof;” provided, of course, the default or dereliction occurs while such bond is a binding, unreleased obligation.

The trial court correctly so ruled. Its judgment holding the obligors on the general bond liable must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARNER, JJ., concur.

[Seals Piano & Organ Co. v. Bell, et al.]

Seals Piano & Organ Co. v. Bell, et al.

Action for Rent.

(Decided Feb. 5, 1916. Rehearing denied March 30, 1916.
71 South. 340.)

1. **Landlord and Tenant; Rent; Attachment.**—It is actual and not constructive fraud which warrants attachment for the rent not due where the tenant has or is about to fraudulently dispose of his goods. (§ 4748, Code 1907.)

2. **Same; Evidence**—Evidence of an attempt to remove the tenant's goods, without the knowledge of the landlord to another city there to be mingled with other goods on which the landlord had no lien, the tenant being solvent, did not show a fraudulent disposition of the goods within the purview of § 4748, Code 1907.

3. **Same.**—The removal of goods under such circumstances of secreting or hiding as would show intent to deprive the landlord of his lien is a fraudulent intent authorizing attachment within § 4748, Code 1907.

(Gardner, J., dissents.)

APPEAL from Montgomery City Court.

Heard before Hon. W. W. PEARSON.

Action by N. J. Bell and others begun by attachment against the Seals Piano & Organ Company, to enforce a landlord's lien for rent not due. Judgment for plaintiffs and defendant appeal. Affirmed in part, and in part reversed and rendered.

TILLEY & ELMORE, and **WILLIAM A. GUNTER**, for appellant.
RUSHTON, WILLIAMS & CRENSHAW, for appellee.

MAYFIELD, J.—On rehearing the majority of the court have reached the conclusion that we were wrong in holding that the trial court committed no error in its findings on the plea in abatement of the writ of attachment. The plea merely denied the existence of the ground of attachment alleged in the affidavit. Issue was joined, and trial was had by the court without a jury, the court finding the issue in favor of the plaintiff and overruling the plea. In this ruling we now hold the trial court erred; the plea should have been held good and the writ of attachment quashed; and such judgment will be here entered as the trial court should have entered.

[Seals Piano & Organ Co. v. Bell, et al.]

(1) We are led to this conclusion for the following reasons: The sole ground alleged in the affidavit which authorized the issuance of the attachment was the first ground mentioned in section 4748 of the Code, as for rent not due, which reads as follows: "When the defendant has fraudulently disposed of his goods or is about fraudulently to dispose of his goods."

The plea put in issue the facts alleged. This ground of attachment is similar to, and in legal effect the same as, grounds 6 and 7 under section 2925 of the Code, relating to attachments by general creditors. The language of this last statute has been construed by this court to mean actual fraud, as distinguished from constructive fraud.

It was ruled by this court in the case of *Durr v. Jackson*, 59 Ala. 207, that fraudulently withholding property, as used in the attachment statute, must involve "actual fraud and evil intent to defraud creditors." Our statutes have been frequently readopted with this construction placed on them; and we see no reason why similar language in a statute giving the landlord a lien and providing for its enforcement by attachment should receive a different construction so far as the statutory grounds for issuing are concerned. This seems to be also the construction placed on similarly worded statutes by English and American authorities. The rule is thus stated in *Ruling Case Law*, vol. 2, § 27, p. 821: "A decided preponderance of authority supports the rule that a mere constructive fraud—that is, an act involving no positive wrong, the invalidity of which arises entirely from the provisions of law—will not warrant an attachment upon the ground of fraud."

(2) We find no evidence in this record sufficient to show "fraud" in the disposition of the defendant's goods, in the sense in which the term is defined above, by our court and other courts, when referring to grounds for an attachment. The most that is shown is a removal of the goods without the knowledge or consent of the landlord, in a way that might impair or destroy the lien given by the statute. This alone, we now hold, is not sufficient to show "actual fraud" or "intent to defraud" the creditor, and to authorize the issuance of the attachment. It is shown that the debtor or tenant is perfectly solvent; and no act is shown, other than the removal of the goods from Montgomery, Ala., to Birmingham, Ala., and there mingling the same with others upon which this landlord has no lien. The mere removal

[Seals Piano & Organ Co. v. Bell, et al.]

of the goods from the rented storehouse or premises, without more, is not a ground for attachment as for rent not due, and is not the equivalent of a fraudulent disposition of the goods, for the reason that section 4739 of the Code, relating to landlords of agricultural lands, makes a removal of the goods from the rented premises a ground for attachment, while the section under consideration, relating to landlords of storehouses, dwellings, etc., contains no such provision. These statutes should be construed in *pari materia*, and this difference in the two statutes is perfectly apparent from a reading of the two together. To construe section 4748 as authorizing the issuance of the attachment for a mere removal of the goods from the rented premises is to read into it provisions which the Legislature omitted from it, and which they inserted in section 4739.

(3) Of course, if the removal of the goods from the premises should be under such conditions and attended with such circumstances, as secreting, hiding, etc., as would show intent to deprive the creditor of his debt and lien, then this would authorize the inference of actual intent to defraud the creditor, and might therefore warrant the issuance of the attachment. But no such facts are shown by this record, and therefore we are not warranted in inferring such fraud as is meant by the statute.

It therefore follows that the finding by the court to the effect that grounds for attachment existed and that the writ properly issued was error; and a judgment will be here entered quashing the writ of attachment, because wrongfully issued.

The judgment against the defendant for the rent due as claimed in the complaint, however, is not reversed or disturbed, but is held to be proper and valid. In fact, there is no assignment of error as to the main judgment, and no insistence that it was erroneous or improper; and it is therefore affirmed. This judgment would have been proper and without error, if the trial court had found in favor of the defendant on the plea in abatement, as we hold it should have done.

Let the judgment of this court be entered in accordance with this opinion.

Affirmed in part, and in part reversed and rendered.

ANDERSON, C. J., and McCLELLAN, SAYRE, SOMERVILLE, and THOMAS, JJ., concur. GARDNER, J., dissents.

[Seals Piano & Organ Co. v. Bell, et al.]

GARDNER, J.—I cannot concur in the opinion of the majority, and will here state briefly my views.

Appellant, a corporation under the laws of Alabama, doing a large business in this state and elsewhere in the purchase and sale of pianos and organs, and with its principal place of business in Birmingham, Ala., rented for a term of three years store-rooms in what is known as the Bell Building, located in Montgomery; the same being property of the appellees. Appellant kept in said stores a stock of goods consisting of pianos and organs and continued to do business there until August 7, 1913, when the lease contract had yet 14 months to run. Appellant concluded to cease business in Montgomery and to move its stock of goods to Birmingham, there to be mingled with its stock in its rented store in that city, which stock consisted of pianos and organs of the same character and manufacture. Effort was made to get appellees to discount the notes for the rent yet to accrue, but the parties could not agree. Without notifying appellees of its intention, appellant then commenced moving its stock; and a large portion thereof had been loaded on cars at the depot, and the remainder was being prepared for shipment, when the attachment in this cause was levied. There had been sued out, just prior to the attachment in this cause, an attachment for past-due rent amounting to \$300, but this was paid, and this past-due rent therefore was not treated by counsel as material to this cause. At the time the attachment here involved was sued out there was no rent past due. The affidavit made in support of the attachment stated as a ground therefor that it was for rent past due, but before the trial was had this affidavit was amended so as to state as cause for the attachment that the defendant was about to fraudulently dispose of its goods.

Upon the trial of the cause issue was taken by defendant upon the truthfulness of the affidavit as amended, which issue came on to be heard by the court without a jury. The court, upon hearing the testimony, reached the conclusion that on the evidence adduced the defendant was, within the meaning of the statute, about to fraudulently dispose of its goods as against the rights of its landlord, and thereupon overruled the plea in abatement. This is the question of prime importance for determination. The evidence shows that the defendant was entirely solvent; and there is no testimony in reference to any disposition, or intent to dispose of, defendant's goods, otherwise than in due

[Seals Piano & Organ Co. v. Bell, et al.]

course of sales, except that in reference to its intention to remove the said goods from defendant's store in Montgomery to its rented store in Birmingham without the knowledge and consent of plaintiffs, and where these goods would be mixed and mingled with other goods of like character for sale in said store.

It is insisted by counsel for appellant, and agreed to by the majority, that to authorize an attachment for rent not yet due upon the ground that the tenant is about to fraudulently dispose of his goods (Code 1907, § 4748) there must exist, and the proof must tend to show, actual fraudulent intent on the part of the tenant to "cheat" the landlord. It is further insisted that the word "dispose," used in the Code section referred to, means assign, sell, or transfer, and that so long as the tenant retains the title and custody of his property there can be no disposition thereof in the sense of the statute. In the case of *Builders' Supply Co. v. Lucas*, 119 Ala. 202, 24 South. 416, this court had under consideration a statute which provided: "That every person who sells, removes or otherwise disposes of property subject to execution, with the intent to hinder, delay or defraud his creditors," should be punished.

It was there said: "The word 'sells,' as used in the statute, implies a divestiture of title by the debtor, and the words 'disposes of,' if they do not mean the same thing, imply some act of the debtor operating on the property itself to place it beyond the reach of creditors, such as removal or secreting of the property."

I need not dwell further on this insistence. It is clear to my mind that the word "dispose," as used in the said statute, should not be construed as being confined to a transfer of the title, but as "implying some act of the debtor, operating on the property itself, * * * such as removal or secretion of the property." I revert, therefore, to a consideration of the insistence that there must appear, within the meaning of said subdivision, an actual fraudulent intent on the part of the tenant to justify the attachment. The lien given by this statute attaches from the commencement of the tenancy for the security of the rent when it matures, and it "attaches for the whole rent, for the entire term, upon all the property belonging to the tenant which 'enjoyed the protection of the premises for which the rent is claimed,' so long as the property can be found and identified, provided it has not come into the hands of a bona fide purchaser for value without

[Seals Piano & Organ Co. v. Bell, et al.]

notice of the lien.”—*Nicrosi v. Roswald*, 113 Ala. 592, 21 South. 338; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 South. 475.

And from *Weil v. McWhorter*, 94 Ala. 543, 10 South. 132, we quote: “It is recognized doctrine * * * that, when a house is rented for mercantile purposes, it is the implied understanding of the parties that goods kept therein for sale may be disposed of in the usual course of the particular business, freed from the claim for rent, and that the purchaser, though with full notice, it may be, that the rent has accrued, takes them discharged from the landlord’s lien. * * * The usual course of trade in such business we apprehend to be the sale of the commodities constituting the stock of goods to persons who have need of them, for money either paid or to be paid. * * * Sales for money take nothing out of the business; indeed, they add to the capital of the business to the extent of the profits which it is to be presumed are made, increase the tenant’s ability to pay rent, and enable him to buy other goods which become subject to the lien and afford security to the landlord until they are in like manner disposed of. And these considerations afford additional reasons for the law’s implication that goods thus sold are by the intendment of the parties discharged of the lien. Not so with respect to a sale in payment of and for the purpose of paying an antecedent debt. This may be beneficial to the tenant, but it cannot be otherwise than detrimental to the business from the point of view of the landlord. The property taken out of the business by such transaction is not replaced by other property, or by money with which to buy other property upon which the lien would become operative. The tenant’s ability to pay rent is lessened. The landlord’s security is decreased. Such transaction can in no just sense be said to be necessary in the prosecution of the business. And every reason for an implication for an intendment between the parties that property so disposed of shall be discharged of the lien is wholly lacking. All this is true, moreover, as well with respect to a sale of any part of the stock upon such consideration as to a sale of the whole of it.”

A lien given the landlord in a case of this character is superior to all other liens except those for taxes.—Code 1907, § 4747. It makes the landlord more or less independent of the solvency or insolvency of the tenant. In this case appellant, charged with a knowledge of the law, placed its stock of goods in the appellee’s store, and the lien attached thereto as security for the rent.

[Seals Piano & Organ Co. v. Bell, et al.]

Without the knowledge or consent of the landlord appellant was proceeding to dismantle its fixtures and remove its entire stock to its rented store in Birmingham. Such being the case, the record shows an intention on the part of the tenant to remove its property covered by the lien of the landlord in such manner and to such place as to lose its identity and thereby to destroy the lien—all without the landlord's knowledge or consent. I am of the opinion that such a destruction of the lien would be a fraudulent disposition of the goods, as against the rights of the landlord, and within the meaning of the statute, although the tenant may have had no actual intent to cheat and defraud. He nevertheless had the intent, or such would be the necessary consequence of his act, to utterly destroy, without the knowledge or consent of the landlord, the latter's lien for his rent. This would be a willful disregard of the rights of the landlord and a willful destruction of the lien given him by the statute.

The reason of the majority would permit the tenant to remove the entire stock of goods beyond the confines of the state, and the landlord would be compelled to stand impotently by and see his lien destroyed unless he were able to show that the tenant acted with the actual intent to cheat and defraud him. Such a construction of the statute would render the lien of the landlord of extremely doubtful value, and in such a construction I cannot concur. Counsel for appellant, in support of his contention that there must be fraud in fact—that is, that the tenant must have the intent to cheat and defraud—cites the case of *Cuendet v. Lahme*, 16 Kan. 527; *Robinson v. Melvin*, 14 Kan. 484; *Donelly v. Stanton*, 6 Misc. Rep. 168, 27 N. Y. Supp. 124; and *McGrath v. Sayer*, 19 App. Div. 321, 46 N. Y. Supp. 113. The cases cited from the Supreme Court of Kansas relate to suits by ordinary creditors without any lien, in which attachments were sued out upon the ground that the defendant had disposed of his property "with the intent to defraud, hinder, and delay his creditors." The two cases from the New York court were of like character, and the attachments were sued out upon the ground that "the defendant was intending to dispose of his property for the purpose of cheating and defrauding his creditors." The cases of *Weare Co. v. Druley*, 156 Ill. 25, 41 N. E. 48, 30 L. R. A. 465, was also of like character as the above quoted, as well as the cases cited in the note thereto, wherein the author of the note states that the preponderance of authority supports the rule that con-

[Seals Piano & Organ Co. v. Bell, et al.]

structive fraud will not warrant an attachment upon the ground of a disposition of property "with intent to defraud." The cases cited in the note show, however, that some jurisdictions hold to the contrary. But these authorities are not here in point, for the reason that they deal with attachments by ordinary creditors without a lien, and in most instances with statutes using the language "with intent to defraud."

The majority opinion places stress also upon section 2925 of the Code, which relates to attachment by general creditors, but the analogy is wholly lacking, because there is no lien interfered with or destroyed. A reference to the citation in the majority opinion of 2 Rul. Case Law, 821, will disclose that the author there was likewise considering attachment by a general creditor, and not a case where a specific lien was involved. I cannot see that the fact that the attachment law as to agricultural tenants makes a removal of the goods from the rented premises a ground of attachment, while the section here under consideration contains no such provision, should be accorded the weight given it in the majority opinion. The reasons applicable to the one are not applicable to the other. The very nature of the business of a tenant of a storehouse would prevent any such provision being inserted in the statute, because his goods are placed in the store to be disposed of, to be removed, and a statutory provision similar to that in regard to agricultural tenants would really seem to hinder and prevent the very purpose of the tenancy.

In 4 Cyc. 419, is cited the case of *Locks v. Boles*, 14 Ky. Law Rep. 573, which is also cited in 5 Cen. Dig. 334, holding as following: "Where a creditor has a lien on goods, and they are about to be sold in violation of his right, he can have a specific attachment without alleging or proving an actual fraudulent intent on the part of the debtor."

But the value of this case as an authority is lessened by the fact that the report of it is not found in our library.

In the instant case we are dealing with a lien on the entire stock of goods for the rent for the entire term, which could be lost only by a sale to a bona fide purchaser without notice of the lien, or by a sale in due course of trade. It cannot be insisted that the removal of the entire stock of goods in the instant case was in due course of trade. That they were to be disposed of after being mingled with the stock of goods in Birmingham in due course of trade is entirely immaterial, as it was the removal

[Seals Piano & Organ Co. v. Bell, et al.]

of the entire stock from the store of the landlords, without their knowledge or consent, against which they have here protested as being in fraud of their rights, and not the contemplated sale of the goods in the usual course of business in Birmingham.

Nor does it seem that the solvency of the appellant can be a matter of material importance in this particular case. The statute gives a lien to the landlord that he may look to the stock of goods, the tangible property, as security for his rent, and does not contemplate that the solvency of the tenant should be sufficient to authorize the lien's destruction. Indeed, I understand the learned counsel for appellant to concede or recognize in his brief that the question of solvency has little bearing on the result of this appeal, as on page 25 of his printed brief he says: "The question is: What is the law as to the right of a tenant, whether he is worth nothing or a million, to remove his stock of goods from one store to another, without his landlord's consent there being no intent (other than such as results as matter of law from such removal) to fraudulently dispose of his goods?"

It is settled in this state that as to existing creditors a voluntary conveyance by a debtor is by presumption of law fraudulent and void, though there is an entire absence of any fraudulent intent, and though the donor is entirely solvent.—*Bibb. v. Freeman*, 59 Ala. 612; 3 Mayf. Dig. p. 861, et seq. Such a conveyance is designated as fraudulent and void as against existing creditors because it is fraud upon their rights in law. I am unable to see how it requires any strained construction to hold that the word "fraudulent," used in the statute, includes a disposition of the goods fraudulent in law as against the rights of the landlord such as is here indicated by a deliberate and intentional destruction of the lien given by statute, without the knowledge or consent of the landlord. The lawmaking body has been most careful to give such a landlord a lien for his protection superior to all other liens, except those for taxes; and it appears to me entirely consistent to construe the statute as forbidding an utter destruction of that lien by the tenant, and thereby leave the landlord helpless unless he can show an actual intent to cheat or defraud. Such a destruction of the lien is a fraud upon the rights of the landlord, and in law is therefore a fraudulent disposition of the property.

I respectfully dissent.

[Hartsell v. Turner.]

Hartsell v. Turner.**Assumpsit.**

(Decided April 6, 1916. 71 South. 658.)

1. **Contracts; Failure to Perform; Right of Recovery.**—Where the contract to drive a well was entire and plaintiff failed to fully and substantially perform, he could not recover on the contract, without more.

2. **Work and Labor; Partial Performance; Quantum Meruit.**—Where the contract to drive the well was entire, and plaintiff failed to fully and substantially perform, he could not recover the value of the labor expended in its partial performance, without more.

3. **Same.**—Where a party has the right to insist on the full performance of the entire contract, but voluntarily accepts the benefit of a part performance, such party is liable for the advantage thus voluntarily accepted; such liability resting not upon the original contract, but upon an implied agreement deducible from the acceptance of a valuable service or thing, but the mere fact that the performer has been benefited is not sufficient to charge the party benefited as upon the quantum meruit.

4. **Same.**—Where plaintiff contracted to drive a well on defendant's premises, and defendant unequivocally repented it because the water then produced was not a performance of the contract, and plaintiff drilled the well deeper, but without success, and then left it, defendant after having another well bored without success, used the limited supply of water from the well bored by plaintiff for more than four years, and aided his tenants in having the well cleaned out, was liable to plaintiff for the value of the labor spent in boring the well, in no event to exceed what would have been the contract price of boring the well to the depth driven, had it then furnished the contemplated supply of water less the value of the pipe contributed by defendant, the fact being that the well presented no obstacle to the use of his premises by defendant.

5. **Same; Jury Question.**—In this case the amount of the recovery upon quantum meruit was for the jury.

APPEAL from Madison Law and Equity Court.

Heard before Hon. JAMES H. BALLENTINE.

Action by Ed Hartsell against Curry Turner for breach of contract, and for work and labor. Judgment for defendant and plaintiff appeals. Reversed and remanded.

Transferred from the Court of Appeals under the act creating said court.

R. E. SMITH, for appellant. DOUGLASS TAYLOR, and CLARENCE L. WATTS, for appellee.

[Hartsell v. Turner.]

SAYRE, J.—On the first trial of this cause in the court below the plaintiff (appellant here) contended that he was entitled to recover the agreed price of his work as for a full and substantial performance of his part of the contract. The Court of Appeals, very properly holding that plaintiff had not fully and substantially performed, reversed the judgment in favor of the plaintiff. —*Turner v. Hartsell*, 4 Ala. App. 607, 58 South. 950, where a statement of the case in its then aspect will be found. On the second trial plaintiff, abandoning his contention as to full and substantial performance, sought to recover on the quantum meruit as for the reasonable value of the well he bored, his theory of the facts being that the well he bored, though it did not furnish the quantity of water contemplated in the contract, yet was of some value, and that defendant had accepted and use it for what it was worth. The trial court gave the general charge for defendant, and plaintiff has appealed.

(1-4) The contract was entire, and plaintiff, having failed to perform fully and substantially, could not, without more, recover on the contract, nor the value of the labor he expended in its partial performance. Any other rule would tend to encourage bad faith and lessen the obligation of contracts into which the parties must be presumed to enter with a full understanding of their necessary implications. But while no claim can be founded upon an express contract which has not been fully performed, nor will the mere fact that part performance has been beneficial be considered as sufficient to charge the party benefited on a quantum meruit, still, if the party who has a right to insist on the full performance of such a contract has voluntarily accepted the benefit of partial performance, the modern doctrine, based upon principles of equity and right, holds him liable to pay for the advantage he has thus voluntarily accepted. Liability in such case is rested, not upon the original contract, but upon an implied agreement deducible from the delivery and acceptance of a valuable service or thing. The difficulty in cases of this character has been to determine how and by what circumstances a voluntary acceptance may be shown. Where the defendant can reject what has been performed without detriment to himself, he will be required to do so; but it would be requiring too much to compel him to abandon his own property because the plaintiff has incorporated his labor with it in a manner incompatible with the agreement. These statements of the law, drawn for the most part

[Hartsell v. Turner.]

from 6 Ruling Case Law, §§ 345-356, where we find a very acceptable statement of it, are in substantial accord with the principles to be deduced from a comparison of our reported cases, though it must be confessed that on the surface at least they do not appear to be entirely reconcilable among themselves.—*Thomas v. Ellis*, 4 Ala. 108; *Davis v. Badders*, 95 Ala. 348, 10 South. 422; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Maxwell v. Delehomme*, 163 Ala. 490, 50 South. 882; *Montgomery County v. Pruett*, 175 Ala. 391, 57 South. 823. Numerous other cases in the same line may be found cited in the cases above.

(5) Whether there has been such acceptance as to charge the defendant in the general run of cases of this character, must frequently be a question for jury decision, and this appeal asserts in substance that the question here should have been submitted to the jury. Defendant unequivocally rejected the well when it reached the depth of 97 feet because the quantity of water it then produced did not constitute a performance of the contract. In view of all the known and undisputed purposes the well was intended to serve, we agree with the Court of Appeals in its ruling that at this point the defendant was right. Plaintiff made his concurrence in this construction of the contract very manifest by proceeding to bore the well some 50 or 60 feet further through the rock. But his further efforts were utterly barren, and there he left the well. Defendant then had another well bored, but that too furnished an inadequate supply of water, so that afterwards his tenants equipped the well in dispute with a rope and bucket and made use of the very limited supply of water thus obtained for drinking purposes, and continued so to do during the four years that passed before the last trial of this case. Defendant knew this and aided his tenants in the use of the well by having it cleaned out. Upon these facts is predicated defendant's voluntary acceptance of what advantage there was in the use of the well—unquestionably some advantage, or it would not have been so constantly used. Defendant was not required to abandon any use of his property, but, on the other hand, the presence of this well on his farm, a six-inch hole in the ground, presented no sort of obstacle to the use of his property without the use of the well as free and full as if the well had not been bored. On these facts, equitable principle would seem to require that defendant should pay plaintiff for the value of the labor ex-

[Reed v. Hammond.]

pendent in boring the well to the depth at which it furnished the water used by the former—in no event, however, to exceed what would have been the contract price of boring the well to that depth had it then furnished the contemplated supply of water—less the value of the pipe contributed by defendant and used in piping the well. These facts, which we have stated according to the tendencies of the evidence favorable to plaintiff, and the result, should have been left with the jury.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Reed v. Hammond.

Assumpsit.

(Decided April 20, 1916. 71 South. 692.)

1. **Judgment; Default; Motion to Set Aside.**—A motion, after suffering default judgment, for a new trial on the ground that the finding was contrary to the evidence, and that defendant had a meritorious defense but was prevented by surprise, accident or mistake, from making it before the court's final finding, but which fails to state any fact in support of the prayer for relief, was demurrable.

2. **Same.**—In such a case, where it did not appear that the petitioner offered to amend the motion, the court properly dismissed it.

3. **Same; Setting Aside Denial.**—A motion to set aside an order denying a rehearing after a default judgment, not accompanied by an offer to amend petition by sworn statement of the facts showing a good and meritorious defense to the action, was properly denied.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROW.

Assumpsit by Bell Hammond against John B. Reed. Default judgment for plaintiff, and from rulings of the circuit court sustaining a demurrer to the defendant's petition for a rehearing, dismissing the petition, and overruling a motion to set aside the former order and allow an amendment to the petition, defendant appeals. Transferred from Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

The original motion for new trial is based on the following grounds: (1) The finding of the court is contrary to the evidence

[Reed v. Hammond.]

in the case. (2) That defendant, without fault on his part, and having a meritorious defense to the case, through surprise, accident, or mistake, was prevented from making said defense before the final findings of the court.

Demurrers were interposed to this motion, and were sustained. The motion was filed February 2, 1915, and demurrers sustained and motion dismissed February 13, 1915. On February 25, 1915, the movant appeared, and moved the court to set aside the order made on February 13th, and permit defendant to amend his motion for new trial so as to show, among other things, that before the judgment was entered, the attorney for defendant had died, and that defendant did not become aware of the death of his attorney of record until about the middle of January, 1915, some time after the judgment had been entered against defendant, and, in support of said motion, to permit defendant to file affidavit. This motion was also denied.

DOUGLASS & RAY, for appellant. A. LEO OBERDORFER, for appellee.

SOMERVILLE, J.—This appeal is from rulings of the circuit court sustaining a demurrer to appellant's petition for a rehearing under section 5372 of the Code, and dismissing the petition, and overruling his motion, made 12 days later, to set aside the former order and allow an amendment to the petition.

(1, 2) The original petition was fatally defective in its failure to state any facts in support of its prayer for relief, and was subject to the demurrer.—*Chastain v. Armstrong*, 85 Ala. 215, 3 South. 788. It does not appear that petitioner then offered to amend the petition, and it was properly dismissed.

(3) Conceding, without deciding, that the entertainment of his subsequent motion to set aside that order was not within the discretion of the court, nevertheless it was without merit, because it was not accompanied by an offer to amend the petition in such manner as to correct one of its substantial and fatal defects, viz., by a sworn statement of the facts showing that petitioner had a good and meritorious defense to the action, and that the judgment was therefore inequitable.—*Dunklin v. Wilson*, 64 Ala. 162; *Chastain v. Armstrong*, 85 Ala. 215, 3 South. 788; Code, § 5373.

[Metropolitan Life Ins. Co. v. Goodman.]

As to the rulings complained of, the trial court does not appear to have been in error, and the judgment appealed from will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Metropolitan Life Ins. Co. v. Goodman.

Assumpsit.

(Decided January 13, 1916. Rehearing denied March 23, 1916.
71 South. 409.)

1. **Insurance; Life; Breach of Warranty.**—Under § 4572, it is not enough for the plea to allege that the assured falsely warranted that he had not been attended by a physician for a serious disease for a given period, as neither of the statutory conditions was thereby fulfilled.

2. **Same; Misrepresentation.**—The provision of § 4572, Code 1907, must be given a liberal construction in favor of the insured.

3. **Same; Defenses.**—A plea alleging that the insured fraudulently suppressed the fact that he had been attended by a physician for a serious disease, although good under § 4299, Code 1907, is demurrable where it fails to allege intent to deceive, as required by § 4572, Code 1907.

4. **Trial; Conflicting Evidence.**—Where there is a conflict in the evidence as to any material matter, it is proper to deny the affirmative instruction.

5. **Appeal and Error; Review; Presumption.**—Where two trials have resulted in the same verdict, an order denying a new trial will not be reversed unless, after allowing all reasonable presumptions of its correctness, the preponderance of evidence against the verdict clearly shows it to be unjust.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Action by Nancy E. Goodman against the Metropolitan Life Insurance Company to recover upon the policy issued on the life of Louis M. Goodman under which she was the beneficiary. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 449. Affirmed.

The pleas are as follows:

(6) The policy sued on contained the following condition: "Unless otherwise stated in the blank space below, in a waiver signed by the secretary, this policy is void if the insured, before

[Metropolitan Life Ins. Co. v. Goodman.]

its date, has been attended by the physician for any serious disease or complaint." And defendant says there is no statement in said policy signed by said secretary waiving such condition; that before the date of said policy the insured had been attended by a physician for a serious disease or complaint, to-wit syphilis, which increased the risk.

(7) Same as 6.

(8) Same as 6, except the disease named is gonorrhea instead of syphilis, named in plea 6.

(9) Same as 8.

(15) Defendant for further plea says the insured under the policy sued on had syphilis, to-wit, from April, 1907, and continuing for about two years and a half thereafter, and was treated for such disease by Dr. A. H. Montgomery, and when said insured applied for policy of insurance sued on said insured suppressed the fact that he had had the disease above named and had been treated therefor by a physician for the time averred, and defendant says this plea is accompanied by payment into the court of the sum of \$22.40, premiums received under said policy.

(13) Same as 6, and adds that insured had said disease when so attended, and said disease increased the risk of loss. This is also accompanied by a plea of tender.

(14) Same as 13.

STEINER, CRUM & WEIL, for appellant. LETCHER, McCORD & HAROLD, for appellee.

GARDNER, J.—This is the second appeal in this cause. For a report of the former appeal, see *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 South. 449. The first assignment of error insisted on by counsel relates to the action of the court in sustaining demurrers to pleas 6, 7, 8, and 9. These pleas were given consideration on the former appeal, but the assignments of demurrer sustained by the court below were not then presented, and the questions now argued were not, therefore, called to the attention of that court.

The provision in the policy held by the Court of Appeals to be a warranty, and which constituted much of the substance of the said pleas, was as follows: "This policy is void if the insured before its date had been attended by a physician for any serious disease or complaint."

[Metropolitan Life Ins. Co. v. Goodman.]

Section 4572 of the Code reads as follows: "No written or oral misrepresentation, or warranty therein made, in the negotiation of a contract or policy of life insurance, or in the application therefor or proof of loss thereunder, shall defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increase the risk of loss."

(1, 2) It is therefore to be noted that under this statute a policy cannot be defeated by the making of a warranty unless the matter misrepresented increased the risk of loss. The court below held the plea subject to demurrer because it did not appear therein that the deceased was afflicted with the disease mentioned in the pleas as having increased the risk, at the time when he was attended by a physician. Counsel for appellant insist that it was sufficient for said pleas to have averred merely that the insured was attended for a serious disease, and that this averment was entirely sufficient without any additional averment to the effect that the insured had such disease at the time he was being attended by a physician. To quote from their brief: "The provision, it will be noted, is not that the insured did not have a serious disease or complaint, but that he had not been attended by a physician for a serious disease or complaint."

We cannot agree in this insistence. As said by the Court of Appeals on the former appeal of this case: "The statute is to be liberally construed so as to advance the legislative intent and suppress the mischief aimed at."

The construction of the provision of the policy of the above-quoted statute, which must be read in connection therewith, contended for by counsel for appellant, would by no means meet the standard of liberal construction, but, on the contrary, it is too narrow to meet with the favor of the court. Indeed, the provision of the policy itself may be construed, at least inferentially, to concede that the insured had a serious disease for which a physician was attending him. In *Mutual Life Ins. Co. v. Allen*, 174 Ala. 511, 518, 56 South. 568, 570, is the following: "The fact, standing alone, that the insured represented that he had not consulted a physician, when in fact he had done so, does not show either 'intent to deceive' or increase of 'risk of loss;' and, unless the misrepresentation was made with such intent, or unless it had the effect to increase the risk, then the statute expressly says it shall not 'defeat or void the policy.' It is neither

[Metropolitan Life Ins. Co. v. Goodman.]

the natural nor the necessary effect of such misrepresentation to show intent to deceive or to increase the risk; hence the intent or the effect required by the statute must be averred, or facts must be alleged from which the intent or effect must necessarily follow. * * * It is not sufficient under our statute to aver merely that this misrepresentation "increased the risk." It may or may not have done so, depending upon the attending facts, which are not averred. Suppose that the physician consulted had found no disease or disorder, and had so advised the insured and the insurer; in such case certainly the misrepresentation could not have increased the risk. In order for the plea to be good under this alternative, it should have averred the facts from which the conclusion is deducible.—4 Mayf. Dig. 467."

As previously stated, this defect in the pleas was not pointed out by appropriate assignments of demurrer on the first trial of the cause, and therefore was given no consideration on the former appeal. We conclude there was no error in sustaining the demurrer to these pleas.

(3) The next insistence is that there was error in sustaining the demurrer to plea 15. It is urged that this plea is wholly unlike the others in that it rests upon the affirmation of fraud in the suppression of a fact by the insured when making application for the insurance, and that it was drawn so as to comply with section 4299 of the Code. It need not be conceded that said plea would be sufficient under said section without reference to any other; but in any event the plea would not be held free from attack unless it also met the requirements of section 4572 of the Code of 1907, which relates specifically to the subject here under review, and wherein it is required that the misrepresentation, to be of any avail, must be made with the actual intent to deceive. As said by this court in *Empire Life Ins. Co. v. Gee*, 171 Ala. 435, 439, 55 South. 166, 168: "Where fraudulent representations are pleaded in defense to an action on a policy of insurance, it must be shown that false statements have been made with intent to deceive, that they related to matters intrinsically material to the risk, and that the insured relied on them. This rule has not been changed by statute or decision."

See, also, in this connection *Mutual Life Ins. So. v. Allen*, 166 Ala. 159, 51 South. 877; s. c., 174 Ala. 511, 56 South. 568; *Penn-Mutual L. I. Co. v. Mechanics' Sav. Bk.*, 72 Fed. 413, 19

[Metropolitan Life Ins. Co. v. Goodman.]

C. C. A. 286, 37 U. S. App. 692; Id., 73 Feb. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L. R. A. 33, 70.

There is no averment in the plea either as to the materiality of the representations or as to any intention on the part of the insured to deceive. The court properly held the plea bad.

(4) The cause proceeded to trial upon the general issue and special pleas 13 and 14, which said pleas, in addition to the averments contained in the special pleas 6, 7, 8, and 9 above referred to, alleged that the insured had such disease when attended by the physician, and which said disease increased the risk of loss. Two physicians were examined by the defendant and one on behalf of the plaintiff. The evidence was in conflict, and the affirmative charge was properly refused.

(5) Much stress is laid by counsel upon the action of the court in denying the motion for a new trial on the ground that the verdict was contrary to the evidence. The case has been twice before a jury, each trial resulting in a verdict for the plaintiff. The evidence was in conflict. The court below had the witnesses before it, and denied the motion. Under the familiar rule announced in *Cobb v. Malone*, 92 Ala. 630, 630, 9 South. 738, this ruling will not be reversed, unless after allowing all reasonable presumptions of its correctness the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. This we are not prepared to do after a most careful examination of the record.—*Const. Cas. Co. v. Ogburn*, 186 Ala. 398, 64 South. 619.

We have here given consideration to the questions argued in brief of counsel for appellant, and, finding no reversible error in the record, it follows that the judgment of the court below must be affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

[Russell v. Bush.]

Russell v. Bush.**Assumpsit.**

(Decided February 10, 1916. Rehearing denied March 30, 1916.
71 South. 397.)

1 Pleading; Conclusion.—Where the action was for commissions for the sale of defendant's property to the government, a plea setting up that plaintiff in making the sale resorted to lobbying to bring personal influence to bear on the officers so as to render the contract voidable at the election of the government, states conclusions and not the facts relied on as is required by § 5330, Code 1907.

2. Same; Sufficiency.—A plea addressed to the whole complaint is subject to demurrer if not a complete answer to every count.

3. Brokers; Completion of Contract; Commission.—Where plaintiff negotiated a sale of defendant's property to the government, but the title was defective, and it was agreed that the government should condemn the land, and that the price agreed upon at the sale should be found as the value of the land, and such agreement was carried out, and the amount paid to defendant, the transfer was not voidable by the government at its option, even though plaintiff used improper influence to induce the sale; the judgment becoming final by the payment, and defendant could not resist an action for plaintiff's commission by a plea that plaintiff had used improper means to influence the government to enter into the contract.

4. Eminent Domain; Right of Appeal; Estoppel.—Where the party condemning takes possession and pays the award, he is estopped from objecting to the proceedings, and waives his right of appeal.

5. Work and Labor; Partial Performance; Right of Recovery.—Although recovery cannot be had under a special contract without showing a substantial performance thereof, yet where a partial performance has resulted in benefits accepted by the other party, and the contract was abandoned by mutual consent or was rescinded or extended by some act or failure of defendant, a recovery may be had therefor upon a quantum meruit for the value of the work performed or services rendered.

6. Evidence; Documentary; Failure to Produce.—Under § 4058, Code 1907, a non suit cannot be properly rendered against plaintiff for a failure to produce a letter where no notice to produce was given, and it appeared that he had destroyed the letter even though it was done to avoid the necessity of producing it, as such relief can only be granted when the document, to produce which the notice was given, was in court or in the possession of one of the parties before the court.

7. Discovery; Statutory Proceeding.—Under § 4055, Code 1907, it is within the discretion of the court to select any one of the three penalties therein provided, and it is not error to refuse a motion insisting that a non suit be entered.

8. Evidence; Presumption; Destruction of Evidence.—Where it appeared that plaintiff intentionally destroyed a letter concerning which he was in-

[Russell v. Bush.]

terrogated, there was a strong presumption that its contents were detrimental to his cause, and he cannot introduce secondary evidence of its contents to rebut such presumption.

9. **Same; Secondary; Materiality.**—Where plaintiff intentionally destroyed a letter to avoid producing it in court, claiming that it contained private matters not related to the case, it was error for the court to sustain objection to the question as to the contents of the letter, so as to require plaintiff to state only so much of the contents as related to the issue on trial, as that left to the witness the determination as to the materiality of the evidence.

10. **Trial; Province of Court and Jury.**—The relevancy and competency of the evidence is for the court, its credibility and weight for the jury.

11. **Appeal and Error; Review; Questions Raised Below.**—The ruling of the court will not be reviewed where defendant stated no reason for objecting to the exhibition by plaintiff's attorney to plaintiff of his answer to interrogatories.

12. **Same; Volunteered Statement.**—Where a witness was shown his former deposition and asked whether he had made a copy of a certain letter, and he then volunteered to state the contents of the letter, an objection to the question does not present for review the matter of the volunteered statement in the absence of an objection thereto or a motion to exclude.

13. **Evidence; Secondary; Preliminary Question.**—It was not error to overrule objection to a question asked plaintiff as a witness whether he had made a copy of a letter which he destroyed to avoid producing it in court.

14. **Trial; Reception of Evidence.**—Where counsel for defendant offered answers to interrogatories in evidence, but withdrew them before they were read to the jury, no instruction to disregard such evidence was necessary.

APPEAL from Mobile Circuit Court.

Heard before Hon. NORVELLE R. LEIGH, Special Judge.

Assumpsit by Albert P. Bush against Julia F. Russell to recover broker's commissions on the sale of real estate. Judgment for plaintiff and defendant appeals. Reversed and remanded.

See also 180 Ala. 590, 61 South. 373.

HARRY T. SMITH & CAFFEY, and GREGORY L. SMITH, for appellant. STEVENS, MCCORVEY & MCLEOD, for appellee.

THOMAS, J.—On the former appeal the law of this case was stated (*Bush v. Russell*, 180 Ala. 590, 61 South. 373), and defendant's pleas 5 and A were held insufficient.

(1) At the last trial the same matter of defense was stated as follows: "A. The plaintiff's said cause of action as sued upon in the complaint is based upon the written contract entered into by and between the plaintiff and the defendant which was fully described in the third count of the plaintiff's complaint and to

[Russell v. Bush.]

which reference is now made, and a part of the consideration for the promise which was sued upon was a promise on the part of the plaintiff to assist the defendant in her efforts to sell to the United States government the property on the northwest corner of St. Joseph and St. Michael streets, and it was one of the implied stipulations of said contract that the plaintiff in rendering such assistance would not resort to such unlawful methods as would render said sale voidable at the election of the United States government; but the defendant avers that, instead of complying with said conditions of said contract, the plaintiff resorted to lobbying in order to bring personal influence to bear upon the officers of the United States government in making such purchase in such manner as to render such contract voidable at the election of the United States government."

The point is well taken by demurrer that the allegation, in this plea, that plaintiff's acts in making said sale were such as to render said contract voidable at the election of the United States government, was in effect a mere legal conclusion, and was not "a succinct statement of the facts relied on," as required by section 5330 of the Code. The authorities on this point were collected by Mr. Justice SOMERVILLE, in *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 301, 56 Am. Rep. 31, to which may be added *Tennessee, etc., Co. v. Herndon*, 100 Ala. 451, 456, 14 South. 287; *Kolsky v. Enslen*, 103 Ala. 97, 100, 15 South. 558; *Johnson v. Ry. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39; *Lawton v. Ricketts*, 104 Ala. 430, 436, 16 South. 59; *St. Louis, etc., Co. v. Phillips*, 165 Ala. 504, 51 South. 638; *Mobile Elec. Co. v. Sanders*, 169 Ala. 341, 351, 53 South. 176, Ann. Cas. 1912B, 461.

Without a statement of the facts relied on to defeat plaintiff's suit, how could the plaintiff know what the real defense was? The plea fails to disclose what act or acts of the plaintiff rendered the contract voidable at the election of the government. It cannot be said that the allegation, that "plaintiff resorted to lobbying in order to bring personal influences to bear upon the officers of the United States government," was sufficiently specific to point out the officers so sought to be influenced, or to amount to an averment that an officer of the United States government having the authority at the time to determine the site of the post office in Mobile was influenced by an improper act of the plaintiff to locate the post office on defendant's lot. It would have been impossible for the plaintiff to prepare to meet such a defense.

[Russell v. Bush.]

The defendant, by her plea, declined to give this specific information relied upon, preferring rather to state her conclusion that the contract of sale was voidable at the instance of the United States government, because of the existence of facts, known to her.

(2) It is fundamental that, if a plea is directed to the whole complaint, it must be a complete answer to every separate count thereof; if pleaded to less than the whole complaint, it must be a complete answer to the count or counts to which it purports to reply. Failing in this, it is subject to demurrer; for a plea must go as far as it professes to go.—1 Chitty, Pl. 476; Arch. Civ. Pl. 168, 173; Gould's Pl. 159, c. 4, § 6; Id. c. 6, §§ 98-9; Stephen's Pl. (Tyler) pp. 215, 216; Heard's Civ. Pl. 161; *Adams v. McMillan, Ex'r*, 7 Port. 73; *Deshler v. Hodges*, 3 Ala. 509; *Standifer v. White*, 9 Ala. 527; *Mills v. Stewart*, 12 Ala. 90; *White v. Yarbrough*, 16 Ala. 109; *Tomkies v. Reynolds*, 17 Ala. 109; *Wilkinson v. Moseley*, 30 Ala. 562; *Galbreath v. Cole, et al.*, 61 Ala. 141; *Foster v. Napier*, 73 Ala. 595; *Werth v. M. L. & I. Co.*, 89 Ala. 374, 7 South. 198; *Smith v. Dick*, 95 Ala. 311, 10 South. 845; *First Nat. Bank of B'ham v. First Nat. Bank of Newport*, 116 Ala. 520, 22 South. 976; *Snedecor v. Pope*, 143 Ala. 275, 39 South.

(3) The complaint contains four counts. The first is on account; the second is for work and labor done; the third is a special count upon the contract therein set forth at length, in which the defendant conditionally agreed to pay the plaintiff for service to be rendered in assisting her to sell certain of her properties to the United States government, and the performance of the service by plaintiff, and the happening of the contingency upon which the agreement to pay the \$30,000 was based, are alleged; and the fourth is a special count upon the same contract, but alleging more in detail the things done by appellee in performing his promise to assist appellant in her efforts to sell to the United States certain property which she owned. Among other things, it is alleged in this count that, after appellee had succeeded in having the United States to select and agree to purchase said property upon the condition that the title be found to be satisfactory, the officials of the United States government in charge of the matter decided that defendant's title was defective; that it was then agreed by all the parties at interest that the United States should condemn the property as a site for the post office building; and that in the condemnation proceedings

[Russell v. Bush.]

the value of the property should be fixed at the amount which the United States had agreed to pay therefor and which appellant had agreed to accept therefor. It is further alleged that condemnation proceedings were instituted and prosecuted to a final decree condemning the property without objection on the part of the defendant, the value being fixed at the amount for which she had agreed to sell, which amount was paid by the United States, to her, in pursuance of said condemnation proceedings; and that appellant then conveyed the said property to the United States pursuant to the decree.

This condemnation was instituted and conducted in the proper court, as a convenient method of taking over the defendant's property according to the agreement of purchase, and of curing any possible defect in defendant's title thereto; at the same time its actual and legal result was a final judgment of condemnation of the property, by a court of competent jurisdiction, rendered at the instance of the United States government against the defendant and said property. A final judgment of such character not appealed from, procured by, and acquiesced in by, the United States government, and fully satisfied by the payment on its part of the damages or purchase price so assessed and adjudged, could not thereafter be disturbed nor vacated. The judgment, being in all things regular and final, precluded inquiry into the preliminary negotiations. The plaintiff may have resorted to lobbying, in the initial proceedings, to bring the property to the attention of the government authorities, and so might have caused an executive officer of another department of the government to suggest such condemnation of the defendant's real property; and yet the United States, by resort to this extraordinary power of government, had taken defendant's said property for its legitimate needs, paid the damages therefor as determined by the rules of law governing such cases, and the defendant owner had received said damages so assessed for the condemned property. Thereafter the United States had no right of appeal or of review, and no right of rescission, for all the negotiations and incidents of purchase, together with the agreement, were merged into the binding judgment, and the judgment was fully discharged, and, so far as the pleadings disclose, the defendant was enjoying the full benefits of plaintiff's services, and no effort on the part of the United States government was being made, or even threatened, to disturb the enjoyment of the proceeds of the condemnation proceedings.

[Russell v. Bush.]

(4) In *Lewis on Eminent Domain*, vol. 2, § 783, it is declared that if the party condemning takes possession of the property under the proceedings (*Wilmington & Susq. R. Co. v. Condon*, 8 Gill & J. [Md.] 443), or pays the damages awarded (*Marquette, H. & O. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788), this will constitute an estoppel from prosecuting objections to the report or the proceedings, and a waiver of the right of appeal. On the same principle, in *Endicott Petitioners*, 24 Pick. (Mass.) 339, it is held that an acceptance of the sum awarded or decreed as damages will preclude an appeal by the defendant in condemnation.—Elliott, App. Prac. § 150; *People v. Mills*, 109 N. Y. 69, 15 N. E. 886; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrall*, 19 Conn. 142; *F. W. I. Co. v. Chicago Co.*, 11 Tex. Civ. App. 600, 33 S. W. 159; *Matter of Woolsey*, 95 N. Y. 135; *Schatz v. Pfeil*, 56 Wis. 429, 14 N. W. 628; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Test v. Larsh*, 76 Ind. 452; *Byer v. New Castle*, 124 Ind. 86, 24 N. E. 578; 1 Elliott on Streets and Roads, § 305. In his Appellate Procedure (section 151), Judge Elliott says: "It will be observed that, in the cases in which it has been held that an estoppel exists, the act necessarily affirmed the validity of the judgment. Thus, where a party accepts money or property awarded him by a judgment, he concedes the validity of the judgment, since it is by virtue of the judgment that he obtains the money or property."

In *Holland v. Spell*, *supra*, Chief Justice Hackney, observes: "We can conceive of no good reason why he should, in good conscience, be permitted to receive all the benefits of the (condemnation) proceeding, and, while holding them, deny that the proceeding is effectual to create the burden corresponding to such benefit."

In *Garrison v. New York*, 21 Wall. (U. S.) 196, 203, 204, 22 L. Ed. 612, the court says: "In the proceedings to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The state, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All that the Constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure."

It follows therefore that plea A was no answer to the fourth count of the complaint.

[Russell v. Bush.]

(5) Although recovery upon the special contract cannot be had without showing substantial performance, yet where a partial performance has resulted in benefits that were accepted by the other party, and the contract was abandoned by mutual consent or was rescinded or extended by some act or failure of the defendant, a recovery may be had therefor under a quantum meruit, for the value of the work performed or services rendered.—2 Greenl. Ev. (16th Ed.) § 104, and authorities; *Thomas, et al. v. Ellis, et al.*, 4 Ala. 108; *Merriweather v. Taylor*, 15 Ala. 735; *Hawkins v. Gilbert*, 19 Ala. 54; *Kirkland v. Oates*, 25 Ala. 465; *Davis v. Badders & Britt*, 95 Ala. 348, 10 South. 422; *Florence Gas Co. v. Hanby, Rec'r*, 101 Ala. 15, 13 South. 343; *Watson v. Kirby & Sons*, 112 Ala. 436, 20 South. 624; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Matthews v. Farrell*, 140 Ala. 298, 311 37 South. 325; *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 South. 579; *Walstrom v. Oliver-Watts Const. Co.*, 161 Ala. 608, 50 South. 46; *Smith v. Sharpe, et al.*, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52; *Dees v. Self Bros.*, 165 Ala. 225, 51 South. 735. In *Montgomery County v. Pruett*, 175 Ala. 391, 57 South. 823, 824, this court declared that a plea setting up the plaintiff's breach of a special provision of the contract is not "a sufficient answer to the common counts, though it may be to a count on the contract." It follows that a plea setting up an implied condition of the contract is no answer to the common count for services rendered.

Appellant's next assignment of error challenges the ruling of the court in declining to compel the plaintiff, Bush, as a witness, to give the contents of a letter that had been destroyed, and in refusing defendant's motion for a nonsuit, because of Bush's failure to set out the letter in extenso in his response to interrogatories propounded to him under the statutes.

(6) The court may, on motion and due notice, on the trial of actions at law, require the parties to produce books, documents, or writings in their possession, custody, control, or power, which contain evidence pertinent to the issue, in cases and under circumstances, where they might be compelled to produce the same by the ordinary rules of procedure in chancery.—Code 1907, § 4058. If a plaintiff fails to comply with such orders, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit, and, if the defendant fails to comply with the

[Russell v. Bush.]

order, the court may on motion give judgment against him by default.—Code, § 4058. Before the passage of this statute, it was held that a court of law could not compel production but courts of equity might.—*V. & A. Min. Co. v. Hale & Co.*, 93 Ala. 542, 9 South. 256; *Golden v. Conner*, 89 Ala. 598, 8 South. 148. In *Sherrill v. Merchants' & Mechanics' Trust & Savings Bank*, 195 Ala. 175, 70 South. 723, this court held that the plan of the statute must be followed, to entitle one to its benefits; and that it must be made to appear that the subjects of the notice to produce were in court or in the possession of one before the court.—*McDuffee v. Collins*, 117 Ala. 487, 23 South. 45.

In the case before us the record does not contain a "motion and due notice thereof" to require the party to produce the letter under section 4058 of the Code. The question for decision arose on the cross-examination of the plaintiff, Bush, while a witness in his own behalf. He was asked by defendant's counsel for certain letters and telegrams received and sent, as to the proposed post office site. The witness admitted that he had sent a telegram to one Armbrecht, and exhibited a copy thereof to counsel. He was then asked: "Will you produce the letter that you received from Mr. Armbrecht?" Witness answered: "No, sir; I could not do it." When asked what he did with the letter, witness answered: "It has been destroyed. There were some matters of a personal nature in that, that had no bearing on this proposition." When questioned as to the date of its destruction, witness answered to the effect that he "could not even approximate it." Counsel then asked: "Don't you know it was, Mr. Bush, * * * you destroyed that letter when I propounded interrogatories calling for it? * * * Was that when I called on you to produce Armbrecht's letters, you tore them up and destroyed them?" Witness answered: "That one letter, yes; I declined to produce it. There were one or two matters of a personal nature in that letter." When asked, "Tell us the contents of that letter, please," witness answered, "No, sir." The defendant then moved the court to compel the witness to give the contents of the letter from start to finish. The plaintiff interposed an objection to this, and, the objection being sustained, defendant excepted, and here assigns this ruling as error. The court, however, then stated that the witness could detail the contents of the letter relating to the case, but not matters of a personal nature.

[Russell v. Bush.]

Obviously, the letter could not have been produced, upon motion and due notice for its production, under the terms of the statute; since the witness stated that "it was destroyed for the purpose of preventing my having it here in this trial."

, (7) The defendant thereupon moved the court to enter a nonsuit or a dismissal of the cause, on the ground that the defendant had propounded interrogatories to the plaintiff in October 31, 1910, amongst other things calling for the contents of a copy of a letter from Wm. H. Armbricht to the witness, referred to in the telegram just read, from Mr. Bush to Mr. Armbricht, and "it now appears from Mr. Bush's testimony that he deliberately destroyed that letter to prevent revealing its contents in answer to those interrogatories, and did so without keeping a copy of that portion thereof which related to this matter, or reciting the contents even so far as that part which related to this matter was concerned." The court overruled the motion, and the defendant excepted. This ruling is assigned as error.

By section 4055 of the Code of 1907, when the answers to interrogatories propounded under the statute "are not full, or are evasive," the court may either (1) attach the party and cause him to answer fully in open court, or (2) tax him with so much of the costs as may be just, and continue the cause until full answers are made, or (3) direct a nonsuit or judgment by default, or enter such decree as would be appropriate if such defaulting party offered no evidence. The court has the discretion which mode to adopt in order to compel full and direct answer.—*Goodwin v. Harrison*, 6 Ala. 438; *Pool v. Harrison*, 18 Ala. 514; *Ex parte Grantland*, 29 Ala. 69; *Ex parte McLendon*, 38 Ala. 276; *Culver v. Ala. Mid. Ry. Co.*, 108 Ala. 330, 18 South. 827. A movant cannot deprive the court of this discretion by limiting his motion to the request for a nonsuit. Whenever the motion so limits the action of the court, it may be refused, even though the trial judge may believe the party against whom the motion is directed was in default and should be compelled or punished by one or the other of the methods provided in the statute. In short, the court, in its discretion, may pursue any one of the three courses provided by the statute, and no error can be predicated upon the refusal of a motion specifically insisting that the court adopt a particular one of the three alternatives, selected and pointed out to the court therein. The exercise of such discretion is not the subject of review.—*City of Bessemer v. Southern Railway Co.*, 157 Ala. 428, 48 South. 103.

[Russell v. Bush.]

(8) The important question presented by the assignment of errors is the court's failure, on motion of defendant, to compel the witness to state the contents of the letter, that the court might judge of its competency, and not leave it to the witness to "state the contents of the letter as relating" to the issue on trial.

In *Broadwell v. Stiles*, 8 N. J. Law 58, the Chief Justice declared that the fact of destruction excites suspicion and unfavorable presumption, and that he who voluntarily, without mistake or accident, destroys primary evidence, thereby deprives himself of the production and use of secondary evidence; that to admit such evidence "under such circumstances is as repugnant to principle as to deny a party the cross-examination of the witness of his adversary."

In *Juzan, et al. v. Toulmin*, 9 Ala. 662, 691, 44 Am. Dec. 448, this court declared, touching the admission of secondary evidence, that "if any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons of its nonproduction" before secondary evidence will be admitted of its contents.—*Agee v. Messer-Moore, etc., Co.*, 165 Ala. 291, 51 South. 829.

An unfavorable inference may be drawn against one who suppresses or destroys evidence. A familiar illustration given of this presumption is found in the case of *Armory v. Delamire*, 1 Stra., 504; s. c., 93 Eng. Reprint, 664. Commenting thereon, Mr. Justice Sherwood (*Pomeroy v. Benton*, 77 Mo. 64, 87) said: "It is easy to see that the chimney sweep's boy would have been in but a sad case, if he had been required to show by 'secondary evidence' what the contents of the empty socket were; something which he knew not; something which the spoliating defendant alone knew."

So in 1 Phillips' Evidence (3d Ed.) 422, the author says it is held in the *Queen's Case* (*Vincent v. Cole*, M. & M. 258) that it is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or to the like effect; because the counsel might thus put the court in possession of a part only of the contents of a written paper. In *Winchell, et al. v. Edwards, et al.*, 57 Ill. 41, 49, it is stated that when a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth

[Russell v. Bush.]

had appeared, it would have been against his integrity, and that his conduct is attributable to his knowledge of the circumstances. The general rule is, *Omnia præsumentur contra spoliatores*.—1 Phillips on Ev. c. 10, p. 602, 2 Note 177 (2) 1 Jones. Ev. §§ 17, 18, 18a; 1 Wigmore, Ev. 278. 291; 2 Chamberlayne, Ev. 1070 A. Mr. Greenleaf (Ev. [16th Ed.] vol. 3. § 34) says that the presumption in such cases “is strong against the party.” but is not conclusive, “because innocent persons, under the influence of terror from the danger of their situation, or induced by bad counsel, have sometimes been led to the simulation or destruction of evidence. But the burden of proof in these cases is on the party to explain his conduct to the satisfaction of the jury.”—1 Greenl. Ev. (16th Ed.) § 37; Best on Presumptions. §§ 145, 149. In *Kyle v. Slaughter*, 158 Ala. 109, 48 South. 343, where the question of inquiry was the effect of a proviso under a certain deed, Mr. Justice Anderson said:

“If the deed contained this clause, its preservation by A. H. Slaughter would have established beyond dispute his title to the property and his right to convey it to his second wife. Sane and reasonable people do not, as a rule, destroy evidence favorable to the establishment of their own title. A party who destroys the evidence by which his claim or title may be impeached thereby raises a strong presumption against the validity of his claim.”

Though there was no formal motion to produce the letter, the record shows that, when testifying as a witness in his own behalf, and cross-examined by defendant's counsel, Bush was producing his correspondence with many parties relating to the location of the post office on Mrs. Russell's lot; that a copy of a telegram from him to Armbrecht showed that the letter in question had been received and that it was important. At this point witness was asked by defendant's counsel to repeat the contents of the letter received from Armbrecht; but witness declined to do so. It was made clear to the court that the plaintiff had destroyed the letter, to prevent being required to produce it on the trial, and that it was destroyed after defendant had propounded, under the statute (Code, §§ 4049, 4057), interrogatories to the plaintiff, Bush, and after the latter had prepared his answers thereto.

If the presumption is against one who suppresses or destroys documentary evidence, and such party may not introduce secondary evidence of the contents of the paper, it is also true that

[Russell v. Bush.]

the opposite party may show its contents, to support the unfavorable presumption that the jury may draw from its suppression or destruction. This may be shown by the testimony of any competent witness knowing its contents.

(9, 10) In this case the defendant sought to establish the contents of a letter, by requiring the recipient to state to the court what the letter contained, to the end that its relevancy might be passed on by the court. The court required the witness to detail only such portion of the contents of the letter as the witness deemed relevant to the issue. This was permitting the witness to pass upon the relevancy of the testimony.—1 Jones, Ev. §§ 173, 174; *De Graffenreid v. Thomas*, 14 Ala. 681; *Western Un. Tel. Co. v. Rowell*, 153 Ala. 295, 315, 45 South. 73; *Dominick v. Randolph*, 124 Ala. 557, 27 South. 481. The judge passes upon the admissibility, materiality, or relevancy, of the evidence offered; the jury decides upon the weight of the evidence. The judge passes upon the competency of evidence and of the witnesses.—*Dominick v. Randolph*, *supra*. The jury passes upon the credibility of the witnesses.—*Venable v. Venable*, 165 Ala. 621, 51 South. 833.

After service on plaintiff of the interrogatories propounded under the statute, calling for the correspondence, the plaintiff cannot successfully maintain that the document called for in the interrogatories and destroyed by him was not material evidence, or that he had disclosed the material portions thereof. Nothing short of the judgment of the court upon the relevancy of the contents of the letter will satisfy the reason for the rule of the authorities we have cited. For this error of the trial court in substituting the judgment of the witness for that of the court, touching the materiality of portions of documentary evidence, the cause is reversed.

(11) The fifth and sixth assignments of error challenge the ruling of the court allowing the plaintiff's attorney to exhibit to plaintiff, as a witness, his answers to interrogatories which had been propounded to him by the defendant. The defendant, objecting to this ruling, assigned no reasons for the objection. There is, then, nothing for us to review.—*Rutledge v. Rowland*, 161 Ala. 114, 123, 49 South. 461; *B. L., L. & P. Co. v. Landrum*, 153 Ala. 200, 45 South. 198, 127 Am. St. Rep. 2'; *L. & N. R. R. Co. v. Banks*, 132 Ala. 471, 31 South. 573; *Williams v. Gallyon*, 107 Ala. 443, 18 South. 162.

[Russell v. Bush.]

(12) Aside from this, no error was committed. Assignment of error numbered 5 asserts that the trial court erred in thus permitting the plaintiff, while a witness, to be shown his answers to the interrogatories theretofore propounded by defendant; and assignment numbered 6 is predicated upon the court's permitting plaintiff, as a witness, to refresh his recollection by inspecting his answers to said interrogatories.—*Riley v. Fletcher*, 185 Ala. 570, 64 South. 85; *Council v. Mayhew*, 172 Ala. 295, 55 South. 314; *B. R., L. & P. Co. v. Seaborn*, 168 Ala. 658, 53 South. 241; *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Mims v. Sturdevant*, 36 Ala. 636; *Bondurant v. Bank*, 7 Ala. 830; 1 Greenl. Ev. (16th Ed.) 543, § 439, C. The exhibition of the interrogatories to witness was not for the purpose of refreshing his recollection as to the contents of the letter or of his former deposition, but on the question whether the witness had made such a copy of the letter or extracts therefrom. No part of the contents of the letter or deposition was called for by the question propounded. When, however, the witness had answered, and volunteered to give the substance of the letter, the defendant should have interposed an objection, or a motion to exclude, as to so much of the answer as was not responsive. The defendant, failing in this, cannot now maintain that prejudicial error was committed.—*Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 308, 56 Am. Rep. 31; *B. R., L. & P. Co. v. Barrett*, 179 Ala. 274, 290, 60 South. 262; *Forrester v. May*, 3 Ala. App. 281, 57 South. 64.

(13) The seventh assignment of error is based on the action of the court in overruling defendant's objection to the following question propounded to plaintiff as a witness, by his counsel: "You were asked the question as to whether or not, at or prior to the time of the destruction of this letter of Mr. Armbricht, you made any copy of that part of it which related to this case. Now, I ask you whether or not you had made, or had the substance of that letter in so far as it related to the post office site matter."

The question went no further than to ask whether or not a memorandum of the substance of the letter, in so far as it related to the post office site, had been made by witness, or at his request—which was competent.

(14) The eighth assignment of error is to the overruling of defendant's objection to the introduction by the plaintiff of that portion of his answers, and the interrogatories propounded by

[Holmes v. Bloch.]

the defendant, which had been shown plaintiff as a witness. The bill of exceptions expressly states that the part of the answers so offered in evidence was never read to the jury. Later, plaintiff's counsel stated to the court that he would withdraw the offer of that part of the answers to the interrogatories which had been offered in evidence by the plaintiff and which had reference to the letter which had been destroyed. The testimony so erroneously offered (*Acklen's Ex'r v. Hickman, supra; Riley v. Fletcher, supra*) not having been read to the jury, there was no reason why the court should instruct the jury on its withdrawal. They did not know its contents and could not have been prejudiced by the erroneous admission as evidence, of the deposition. If, however, the document had been read to the jury and subsequently withdrawn, appellant would have been entitled to some specific instruction by the court to the jury, on its exclusion, that they should in no wise consider the testimony so withdrawn, in reaching a verdict. No rule of common sense would require that the jury be so instructed touching a matter of testimony that had not in fact come to their knowledge. The question here presented, on the exclusion of evidence erroneously admitted, is not the same as that in *Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 480, 16 South. 538, on which this court declared the rule.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. GARDNER, J., not sitting.

Holmes v. Bloch.

Assumpsit.

(Decided April 20, 1916. 71 South. 670.)

1. Sales; Contract; Countermanding.—Where the order signed by the defendant reserved the right to the seller to accept or reject the sale made by its representative, the sale was conditional, and the buyer could countermand it at any time before its acceptance.

2. Evidence; Letters; Presumption.—Where a letter is mailed with postage prepaid and properly addressed, there is a presumption that it was duly received by the addressee, but this presumption is rebuttable.

3. Sales; Countermand; Evidence.—Under the evidence in this case it was a question for the jury whether the buyer had countermanded the order

[Holmes v. Bloch.]

before acceptance, there being evidence that the countermand was posted only a short time after the order was given, and that the two would leave on the same mail.

APPEAL from Montgomery City Court.

Heard before Hon. C. P. MCINTYRE.

Assumpsit by B. K. Bloch doing business as the Empire Distilling Company, against Lee Holmes. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Transferred from Court of Appeals under act creating that court.

RUSHTON, WILLIAMS & CRENSHAW, for appellant. BALL & SAMFORD, for appellee.

MAYFIELD, J.—This is an action to recover the purchase price of five barrels of whisky. Four counts declare each on promissory notes made by defendant, payable to plaintiff, for the aggregate price of the whisky. There is no dispute that the notes were given as for the purchase price of the whisky, nor that they were delivered to plaintiff's agent and salesman. The defense set up is that there was only an agreement to sell, made by and between the defendant and the plaintiff's agent or salesman, which agreement was by its very terms subject to the ratification or rejection of the plaintiff, the contemplated seller; and that the defendant revoked the order for the whiskey and declined to purchase, before the agreement was over ratified or rejected by the plaintiff, and that consequently, in fact and in law, there was no sale—that the contract to sell was not consummated.

It appears without dispute that there was never any delivery in fact of the whisky, but only an offer to deliver, and a declination by the defendant to accept, or receive.

The contention of plaintiff is that the order of purchase, and to ship, was not countermanded until after the agreement by its agent to sell had been ratified, and until it had offered to ship, and that the sale was therefore consummated, and that the defendant was therefore liable as if he had accepted and received the goods.

The evidence of defendant tended to show that he did make an agreement with plaintiff's agent to purchase, and did order the whisky to be shipped him, and did execute the notes sued on, as for the purchase price; but that on the same day, and within

[Holmes v. Bloch.]

less than an hour, he wrote a letter properly addressed to the plaintiff, with the proper postage affixed, and mailed it promptly; that by this letter he countermanded the order and directed plaintiff not to ship the goods. There was also evidence tending to show that the order for the whisky, and contract to purchase, was mailed at the same time—that is, on the same day—at the same place, viz., Montgomery, Ala.; and that the order and defendant's letter containing the countermand were each addressed to the plaintiff at 200 Fifth avenue, New York City, state of New York.

It was certainly open for the jury to infer, from all the evidence offered, that both the order for the whisky which was subject to the approval or rejection of the plaintiff, and the alleged letter countermanding the order, left Montgomery, Ala., or were mailed in Montgomery, addressed to the same party at the same destination, on the same day, and within a half hour of the same time.

The question of law involved is whether or not the jury could infer that the plaintiff received the countermanding order, before the acceptance of the order. There is no direct and specific proof of this fact; and, in fact, the plaintiff denies so receiving the countermanding order, before acceptance.

The trial court evidently ruled that the evidence was conclusive of this question, or that there was no just inference for the jury to draw that the countermanding order was received by plaintiff before the acceptance of the order. We conclude this, from the fact that the trial court gave the affirmative charge for the plaintiff.

The order or contract of purchase was unquestionably conditional. It was as follows:

"Montgomery, Ala., Oct. 17th, 1912.

"Empire Distillery Co., B. K. Bloch, Prop., 200 Fifth Avenue, New York—Gentlemen: I have this day bought of you through Mr. H. Kramer, 5 barrels whisky in bond, and have received warehouse contract certificate covering said whisky as follows:

| No. | BRAND | Age | Proof | Pr. Per | Total |
|-------------------|------------|-----|-------------------|------------|--------|
| W. C. C. 28400 | Old Empire | 7 | Gallons 235.35 | Gal. 90 | 211.81 |

[Holmes v. Bloch.]

"Cash \$ No and notes for \$211.81. Said whisky or its equivalent is to be sent, upon my order on compliance with terms of contract and after payment of notes as they mature. This order slip together with said certificate constitute the complete contract, no other agreement being recognized, said contract being subject to the approval of your home office and to be binding upon you only upon receipt by your home office of all moneys and notes paid hereon.

"Lee Holmes,
"(Signature of purchaser)
"144 Mobile St.,
"(Address)."

Kramer testifies that he sent this order and these notes to plaintiff at New York by mail, and must have sent them after they were signed. The defendant, after testifying to having signed the order and notes, and to the agent's leaving his office, further testified in part as follows:

"About half an hour after Mr. Kramer left my office, I wrote a letter to the Empire Distillery Company addressing it to 200 Fifth avenue, New York City, countermanding the order which I had just given their agent, Mr. Kramer. This letter was deposited by me in the United States mail postage prepaid. A few days after this I received through the mail a circular letter from B. K. Bloch on a letter head of the Empire Distillery Company sending me a certificate substantially the same as that attached as Exhibit D to the deposition of Mr. Kramer in this case. I immediately returned this certificate to the Empire Distillery Company, and told them that I had nothing to do with it, as I had previously countermanded the order. They sent the certificate back to me, and I promptly returned it to them again. They sent it back, and I sent it to them once more, and my recollection is that they returned it still another time. I immediately mailed it back to the distillery company and have not seen it since. The Empire Distillery Company has never offered to deliver the whisky to me, nor have they ever told me that they had put aside any whisky for me, except as shown in the circular letter dated October 19, 1912, a copy of which is attached as Exhibit C to Mr. Kramer's deposition."

(1) If the plaintiff received the countermanding order before acceptance of the order of purchase, then the plaintiff cannot recover in this action, because the sale was never consummated,

[Holmes v. Bloch.]

the two minds contracting never met at the same time. The defendant had the right to countermand at any time before acceptance.

What was said by this court in the case of *Gould v. Cates Chair Co.*, 147 Ala. 634, 41 South. 675, is applicable and conclusive of this question of law—that is, the right of defendant to countermand: “The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiff could have refused to accept the order. Neither party had become bound by anything then done. The order of defendant was a mere proposal, to be accepted or not as the plaintiff might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium*.—Benj. on Sales, §§ 40, 70.”

(2, 3) Did the defendant in this case in fact countermand the order before acceptance, and before shipment? The goods were never shipped, but plaintiff says the order was accepted, and there is no positive proof that the countermand was received before acceptance.

The evidence of the defendant in this case was sufficient to carry the case to the jury, as to whether or not there was a revocation of the order before an acceptance by the plaintiff.

In this country the mail service is regulated and carried on by law; and by common experience and common consent it is established, from the regularity of the service, that it may be inferred that letters mailed or posted at the same time and place, and addressed to the same party at the same place, will be transported by the mails with the same regularity. When certain necessary conditions (shown in this case) are complied with, the mailing of the letter or other posted matter gives rise to or authorizes the inference that it arrived at its destination in due course of mail. The rule has been thus stated by this court:

“The presumption of law is that a letter, postage prepaid, mailed to one at the place of his residence, or at the place he usually receives his letters, was received by him. This presumption, however, is rebuttable by proof.—*Steiner v. Ellis*, 7 South. 803; *O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 304, 20 South. 413; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 South. 570; 1 Green. Ev. § 40.”—*Pioneer Co. v. Thompson*, 115 Ala. 552-557, 22 South. 511.

The same rule is stated by Mr. Chamberlayne, in his recent work on Evidence (volume 2, § 1057); and in note he quotes the

[Sovereign Camp W. O. W. v. Ward.]

following: "The depositing in the post office of a letter properly addressed, with the postage prepaid, is prima facie evidence that the person to whom it was addressed received it. The fact that the defendants had no additional proof that the letters were actually received by the plaintiff is immaterial. The evidence that letters were so deposited was competent, and should have been submitted to the jury to be weighed by them in connection with the other evidence in the case. They alone have the right to decide whether the inference that the letters were received, founded upon the probability that the officers of the government will do their duty, and that letters will be duly delivered, is overcome by the other evidence."—*Briggs v. Hervey*, 130 Mass. 186 (1881).

"It is well settled that the fact of depositing, in the post office, a properly addressed, prepaid letter, raises a natural presumption, founded in common experience, that it reaches its destination by due course of mail. In other words, it is prima facie evidence that it was received by the person to whom it was addressed; but that prima facie proof may be rebutted by evidence showing that it was not received. The question is necessarily one of fact, solely for the determination of the jury, under all the evidence."—*Whitmore v. Dwelling House Ins. Co.*, 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838 (1892).

The judgment of the court below is reversed, and the cause is remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Sovereign Camp W. O. W. v. Ward.

Assumpsit.

(Decided February 10, 1916. Rehearing denied March 30, 1916.
71 South. 404.)

1. **Insurance; Life; Complaint.**—Where the action is on a life insurance contract, the complaint must show that the liability accrued within the period covered by the policy.

2. **Same; Fraternal Benefits; Complaint.**—Where the complaint claimed a sum due on a certificate of insurance issued by fraternal benefit association on a certain date by which it agreed to pay to plaintiff a sum certain on

[Sovereign Camp W. O. W. v. Ward.]

the death of the insured, and averred that the insured died on a certain date, which was within eight months of the issuance of the certificate, that defendant had had notice of his death, and that the certificate was the property of plaintiff it was not subject to demurrer.

3. Jury; Qualifications; Interest; Membership in Order.—In an action on a fraternal benefit certificate, a member of such order has an interest which disqualifies him as a juror, upon the objection of defendant.

4. Evidence; Secondary; Notice to Produce.—Where the notice to produce a document given to the adversary party as required by § 4058, Code 1907, did not give such party sufficient time to procure it from where it had been sent, secondary evidence of the contents of such document was not admissible.

5. Witnesses; Confidential Communication.—Where the action was upon a fraternal benefit certificate, and the defense was suicide, a letter written by the attorney of the benefit association to the head office thereof stating that the order was not liable, but recommending a compromise, was not admissible to show formal notice of proof of loss, or waiver thereof, since it was a confidential communication by an attorney containing privileged matter.

6. Evidence; Hearsay.—A statement by a witness: "they said he died from taking carbolic acid" was hearsay and properly excluded.

7. Same; Secondary; Proof of Loss.—Where the physician testified that he took a note from the clothing of deceased-insured and gave the note to another witness, and the other witness testified that he had laid it aside and had not seen it since, this was sufficient to authorize the admission of secondary evidence of the contents of the note.

8. Same; Opinion.—Where the action was upon a fraternal benefit certificate, defended on the theory that insured committed suicide, a statement by a physician that insured committed suicide was a statement as to the material facts and inquiries and not competent as evidence.

9. Insurance; Fraternal Benefit; Evidence.—Evidence that deceased was addicted to the drink habit just preceding his death, was competent in connection with evidence as to his efforts to abstain therefrom and his purpose to do so, the defense being that insured committed suicide.

10. Same.—Under the evidence in this case it was a jury question whether insured committed suicide or not.

APPEAL from Butler Circuit Court.

Heard before Hon. A. E. GAMBLE.

Action by Nettie B. Ward against Sovereign Camp of the Woodmen of the World. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

The defenses were the general issue, the suicide clause, and the by-laws of the order relative thereto. The matter relative to the jurors sufficiently appears. There was some controversy between attorneys as to the forwarding of notice and proof of death to the office in Omaha, Neb., but it appears that it was

[Sovereign Camp W. O. W. v. Ward.]

forwarded by a local clerk, and it appeared that notice to produce these writings had been given about 24 hours before trial, and that the notice was waived, but defendant attorney insisted the notice was not sufficient in point of time to get the original documents from Omaha, Neb., and the court, over defendant's objection, permitted proof to be made thereof, and also permitted plaintiff to introduce a letter directed to J. S. Kern as clerk of the camp, and signed by A. H. Burnett, general attorney, the contents of which were substantially that the report indicated that Mr. Ward committed suicide, and that, not having been a member for five years, he was not entitled to anything, but under the circumstances the attorney expressed a willingness to recommend a small amount in compromise. The witnesses Pierce and Kern testifying said they knew Ward, that he died about 6 o'clock in the evening, and that they said he died from taking carbolic acid, that it smelled like acid, and that he had a sore on his mouth. On motion of plaintiff, the court excluded statement that they said it was carbolic acid. The witness Hawkins testifying as a physician relative to his examination of the body of Ward, stated that he examined his pockets, and in an inside vest pocket found a note, which he gave to Mr. Waller, Ward's father-in-law, and that Mr. Waller had it the last time he saw it, and that he did not know where the note was now. Waller, testifying, stated that he was served with a subpoena to bring in the papers or writings in his possession found on the body of Ward, but that he did not know what had become of the note, that he laid it aside, and had not seen it since. On this proof, the defendant reintroduced Dr. Hawkins, and asked for the contents of the note. Upon plaintiff's objection, the court refused to permit witness to testify.

C. H. ROQUEMORE, E. T. GRAHAM, and C. F. WINKLER, for appellant. POWELL & HAMILTON, for appellee.

THOMAS, J.—(1) In a suit on a life insurance contract, the complaint must show that the liability accrued within the period covered by the policy.—*Eminent Household, etc., v. Gallant*, 194 Ala. 680, 69 South. 884; *U. S. H. & A. Ins. Co. v. Savage*, 185 Ala. 583, 61 South. 817; *U. S. H. & A. Ins. Co. v. Veitch*, 161 Ala. 630, 50 South. 95.

(2) The complaint was not subject to the demurrers directed against it. The complaint alleges: "Nettie B. Ward, Plaintiff, v. Sovereign Camp of the Woodmen of the World.

[Sovereign Camp W. O. W. v. Ward.]

"The plaintiff claims of the defendant the sum of two thousand and 00/100 dollars, due on a certificate of insurance issued by the defendant to J. R. Ward, on to-wit, the 6th day of May, 1914, in and by the terms of which the defendant agreed to pay to the plaintiff, who was the wife of the said J. R. Ward, the sum of two thousand dollars upon his death.

"Plaintiff avers that the said J. R. Ward died on, to-wit, the 15th day of December, 1914; that the defendant has had notice of his death; and that said certificate of insurance is the property of the plaintiff."

(3) Assignments of error numbered from 2 to 12, inclusive, challenge the ruling of the trial court as to the competency of jurors Douglas, Kirkpatrick, Dees, and Mills, for that, in response to questions propounded to the jurors upon their voir dire to ascertain if any of them were members of the defendant order, said jurors on the panel answered that they "were members of the defendant order;" and one of these jurors, Dees, against defendant's objection and exception, became a member of the jury trying the cause.

In *Calhoun County v. Watson*, 152 Ala. 554, 44 South. 702, a suit against the county to recover ex officio services by the clerk of the circuit court, challenges were sustained of jurors who were in the employment of the county commissioners as such. The court held that trial judges cannot be too zealous in ridding the jury of men whose interest and environment is calculated to sway them in the slightest degree. The fact that the jurors excused by the court were employed by the commissioners might be but slight incentive to bias, yet it was the action of the commissioners that was being assailed by this suit.—*Louisville & Nashville R. Co. v. Young*, 168 Ala. 551, 53 South. 213; *Stennett v. City of Bessemer*, 154 Ala. 637, 45 South. 890.

In *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006, questions were propounded to the jurors to ascertain if either was a member of the defendant order, and the exception was reserved by the defendant to such qualification by the court. It was held that the question touching such membership and, of necessity, their qualification, was proper.

In *Stennett v. City of Bessemer*, *supra*, it was held that the court was justified in excusing a juror who had a similar case against the defendant, because "the law implies a bias;" and in *L. & N. R. Co. v. Young*, *supra*, the jurors in question were em-

[Sovereign Camp W. O. W. v. Ward.]

ployees of the defendant, and the rule of bias implied by the law was sustained. In *Calhoun v. Hannan & Michael*, 87 Ala. 277, 6 South. 291, the court declined to put the trial court in error for refusing to sustain the challenge of a juror on the ground that he was "an employee of another party who had a similar suit in court." This case is clearly distinguishable from *Stennett v. City of Bessemer*, *supra*. The right of neither party, to a jury free from bias or interest, is lost or subjected to chance or peril, because a struck jury is demanded. *Dothard v. Denson*, 72 Ala. 541; *Lewis v. State*, 51 Ala. 1; *Davis v. Hunter*, 7 Ala. 135.

We are of opinion that the trial court committed error in not excluding the juror Dees upon the reasons controlling in the adjudged cases herein cited. It is true that in these cases the appeal was to review the action of the trial court in excusing jurors from the panel, or in sustaining challenges of jurors; but the same good reason upon which those decisions turned underlies the objection made in the case at bar.—*Martin v. Farmers' Mut. F. I. Co.*, 139 Mich. 148, 102 N. W. 656; *Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Pennewill (Del.) 160, 39 Atl. 1098.

(4) To authorize secondary proof of documentary evidence, a proper predicate must be laid, or due notice to produce be given under the statute.—Code 1907, § 4058; *Russell v. Bush*, *infra*, 71 South. 397; *Golden v. Conner*, 89 Ala. 598, 8 South. 148. The rule is that such notice be given as will enable a compliance therewith. The documents relating to the proof of death, in Omaha, Neb., could not be produced in Greenville on the day's notice.

The defendant will be prepared on another trial to comply with the demand for the production of these documents.

(5) The letter from defendant's general attorney may have tended to show notice of proof of loss received, or a waiver of former proof, yet it was not competent to introduce the same in evidence for that purpose, over the objection and exception of defendant. It was a confidential communication between defendant or its agents and the general attorney of defendant, containing privileged matter.—*Ganus & Co. v. Tew*, 163 Ala. 358, 50 South. 1000; 7 Mayfield's Digest, 331.

(6) There was no error in the refusal of the court to admit the hearsay declarations of witness Kern and witness Pierce.

(7) The predicate was sufficiently laid for the admission of the secondary evidence of the contents of the note taken from the body of the deceased by the attending physician, and given

[Sovereign Camp W. O. W. v. Ward.]

to the witness. He had the subpoena duces tecum, and stated in response thereto that he did not have the paper after carrying it home and laying it aside.—7 Mayfield's Digest, 331.

(8) No error was committed in excluding that part of the answer of Dr. Hawkins that "he committed suicide." This was the question of fact made a material inquiry in the case—the manner and cause of decedent's death. Whether by accident or suicide was the issue, and the fact could not be shown by such declarations.

(9) The inquiry was pertinent whether the decedent was addicted to drink immediately preceding his death. Under the plea setting up the suicide exemption of the contract of insurance, this evidence should have been allowed for the consideration of the jury in connection with any recent declarations of decedent, sought to be shown, relative to this unfortunate habit, if such existed, and his effort and purpose to abstain therefrom.

(10) The affirmative charge was properly refused. These were questions of fact, for the decision of the jury.—*Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD and SOMERVILLE, JJ., concur. ANDERSON, C. J., concurs in the conclusion and opinion, except in the holding that there was reversible error in not excusing the juror Dees, because a member of the defendant order. He thinks that the court could well have excluded this juror, but that the defendant was not prejudiced by having a juror who was a member of its order, and whose bias, if any there was, was favorable to the defendant.

[Porter, et al. v. Watkins.]

Porter, et al. v. Watkins.**Assumpsit.**

(Decided April 20, 1916. 71 South. 687.)

1. **Dismissal and Non Suit; Setting Aside; Discretion of Court.**—Where plaintiff's counsel through inadvertence asked that the action be discontinued against one of defendants who had been served and had defended on a previous trial, but before judgment or any minute entry, discovered his mistake, and entered a motion to set aside the discontinuance and allow plaintiff to proceed against such defendant, the court properly allowed the motion as the order had not passed beyond the control of the court.

2. **Same; Discontinuance.**—A discontinuance is an abandonment or chasm or interruption in proceedings occasioned by the failure of a plaintiff to continue suit regularly from time to time as he should; hence, no discontinuance was worked where the court, through inadvertence of counsel ordered an action discontinued as to a defendant, but before the order was entered, set it aside, counsel having discovered his mistake and entered the proper motion.

3. **Evidence; Secondary; Proof of Loss.**—Every reasonable effort which might have resulted in the production of a missing paper must be shown to have been made without avail before secondary evidence of the contents thereof can be received.

4. **Appeal and Error; Harmless Error; Evidence.**—The exclusion by the court of secondary evidence of the contents of a lost receipt was not error, or if error was harmless, where it appeared that one was received in evidence, and defendant was permitted to testify that some time after the first payment another payment was made which discharged the note sued on, such testimony showing all of the essentials of the receipt.

5. **Payment; Application; Right to Direct.**—A debtor has the right to direct the application of a payment, and the creditor may make application as he desires if the debtor fails to direct; the law, in the absence of a specific application by either the debtor or the creditor would apply the credit most beneficially to the creditor, that is, to the most precarious debt, or the one least secured, and payment cannot be applied to a debt not matured where there is an unsatisfied matured one, except by consent of the parties.

6. **Charge of Court; Applicability to Evidence.**—Where the action was upon a note, and there was no evidence that the debtor ever directed payment to be applied on the note, a charge asserting that the debtor had the right to direct what note the payment by him should be applied to, and credit be given as directed, was abstract and properly refused.

APPEAL from Tallapoosa Circuit Court.**Heard before Hon. S. L. BREWER.****Assumpsit by T. H. Watkins against C. F. Porter and others.
Judgment for plaintiff and defendants appeal. Affirmed.**

[Porter, et al. v. Watkins.]

Transferred from Court of Appeals under act creating that court.

JAMES W. STROTHER, for appellant. BULGER & RYLANCE, for appellee.

MAYFIELD, J.—This was an action on a promissory note, against several defendants, among whom was one Porter, appellant. There was dismissal or abatement as to several defendants, on account of death, bankruptcy, etc.

(1, 2) Counsel for plaintiff, who appeared for the first time (the plaintiff, at previous hearings and trials, having been represented by other counsel), after asking orders for dismissal as to some of the defendants on account of death, bankruptcy, etc., asked that the case be discontinued as to the defendant Porter, and the court announced that the order was granted; but, before any judgment or minute order to that effect was entered counsel discovered that Porter had been served, and had defended on former hearings. The court, on motion of counsel, set aside the order of discontinuance and allowed plaintiff to proceed to trial against Porter.

There was no error in this action of the court. The first order had not passed beyond the control of the court, and, being taken on a mere oversight or mistake of counsel, the court properly allowed the case to proceed against Porter. No judgment or order to that effect was ever entered, and no error occurred on account of which Porter or any of the other defendants should be allowed to profit. There was therefore neither in fact nor in law a discontinuance as to Porter. There was no sufficient gap or chasm in the proceedings to amount to a discontinuance in law. The record proper shows no discontinuance. All that appears is in the bill of exceptions, and it shows that the final action of the court was to decline to allow or sanction a discontinuance, and to merely reverse a former ruling which was invoked by a mistake of counsel.

In Bouvier's Law Dictionary, a "discontinuance" in practice is said to be "the chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time as he ought." It is, in substance and effect, an abandonment of the moving party of his pending cause.—*Ex parte State*, 71 Ala. 367. It has been many times decided by this court that official neglect or refusal of the clerk to perform the duties re-

[Porter, et al. v. Watkins.]

quired of him will not operate a discontinuance.—*Wiswall v. Glidden*, 4 Ala. 357; *Drinkard v. State*, 20 Ala. 9; *Harrall v. State*, 26 Ala. 52; *Brown v. Clements*, 24 Ala. 354; *Ex parte Remson*, 31 Ala. 270; *Glenn's Adm'r v. Billingslea*, 64 Ala. 345.

While it is true that a discontinuance puts an end to the cause, yet, where a mere order or announcement has been made to that end, such order or suggestion may be changed or corrected during the term of the court at which it was originally made; and certainly so, where, as in this case, the two orders were practically simultaneous.—*Curtis v. Gaines*, 46 Ala. 459.

(3) The defendant testified to having made two payments, one of \$125 and one of \$5. He introduced a receipt for the first, and offered to prove the contents of the receipt for the latter; but the court declined to allow the proof, on the ground that the absence of the original was not sufficiently accounted for.

If the loss of a paper is relied on, to account for its nonproduction, the fact of its loss is not established without proof of diligent search where the paper is most likely to be found and the particular character of the search should be shown. Every reasonable effort which might have resulted in the production of the missing paper should be shown to have been made without avail, before secondary evidence can be received.—*McEntyre v. Hairston*, 152 Ala. 251, 44 South. 417; *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663; *Boulden v. State*, 102 Ala. 78, 15 South. 341; 6 Mayf. Dig. 336.

(4) We are not prepared to say that the trial court was in error, but, if error there was, it was without possible injury. It was only a receipt offered to be proven; and the witness did in fact testify, without objection, as to everything proper for a receipt to contain. The receipt introduced was as follows: "Received of O. M. Porter, \$125.00 on the amount due on his father's note.—Thad H. Watkins."

We quote from the same witness as follows: "The Court: 'That \$125.00 was in 1907?' Defendant's counsel replied: 'Yes, sir, in 1907.' Said witness further testified as follows: 'Five dollars and something, my son paid after that. That was paid in about ten or fifteen days after the receipt. That paid the balance on that note. I have not the receipt for that five dollars; my son has it, and it in here last summer was a year ago. My son is in Texas; it is not in my possession, my son has it; it is just like that.'"

[Porter, et al. v. Watkins.]

He certainly could not have testified any more fully as to a mere receipt for five dollars.

(5, 6) The defendant Porter requested the giving of the following charges, "A" and "B," which were refused:

"A. The court instructs the jury that C. L. Porter had a right to direct what note the \$125 payment by him should be applied to, and credit must be given as directed by him."

"B. The court instructs the jury that if you believe the evidence the \$125 payment was made on the note sued on."

These charges were properly refused. Charge A, under the evidence in this case, was calculated to mislead, although, abstractly considered, it states a correct proposition of law.

The following, among other rules as to the application of payments to different debts, are propositions that have been frequently reaffirmed by this court:

The debtor, at the time of making payment, has the right to direct the application of the amount to any particular debt; if he fail so to do, before or at the time of payment, the creditor may then direct it; if he do not so do, then the law directs the application.—*Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Kent v. Marks*, 101 Ala. 350, 14 South. 472; 4 Mayf. Dig. 430.

If a paying debtor fails to give directions as to the application, then the creditor may elect on which of two or more debts, past due, he will allow the credit; and, if neither expresses any election, then, as between such debts, the presumption of the law is that the credit is applied most beneficially to the creditor—that is, to the most precarious debt, or the one least secured. It cannot, without consent, be applied to an immature debt when there is an unsatisfied mature one.—*Callahan v. Boazman*, 21 Ala. 246; *Bobe v. Stickney*, 36 Ala. 482; *Robinson v. Allison*, 36 Ala. 525; *Johnson v. Thomas*, 77 Ala. 367; *Taylor v. Cockrell*, 80 Ala. 236; *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; 4 Mayf. Dig. 430.

We fail to find evidence in this record which conclusively shows that the debtor ever directed the payment of the \$125 to the note sued on. In fact, the receipt offered in evidence by the defendant, taken in connection with the other evidence, tends to show that no request was made by the debtor, before or at the time of payment, that the amount should be applied to the note sued on. Such was certainly not shown without dispute; and hence charge A was calculated to mislead the jury to infer that such a

[Lowy, et al. v. Rosengrant.]

demand was made, or that the right of the debtor to so apply the payment was invoked before, or at the time, the payment was made.

Charge B was properly refused, because, at best that could be said in its favor, the application of the payment was a question for the jury, and this charge took the question from the jury.

There was evidence, also, sufficient to carry the question of attorney's fees, and the amount thereof, to the jury; and hence the defendant was not entitled to the affirmative charge on this phase of the case.

We find no error in the trial court's overruling defendant's motion for a new trial. We find no sufficient reason for disturbing the verdict of the jury or the judgment of the court entered thereon.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Lowy, et al. v. Rosengrant.

Assumpsit.

(Decided January 20, 1916. Rehearing denied March 30, 1916.
71 South. 439.)

1. **Work and Labor; Quantum Meruit; Contract.**—Recovery on the quantum meruit can be had for the balance due for the executed part of a contract, subject to recoupment for resulting damages from a failure to complete performance, that can be calculated with any degree of certainty.

2. **Sales; Failure to Deliver.**—Failure of a seller of goods to deliver on time gives the buyer an option to treat the contract as terminated, or to waive the time limit, and insist on delivery within a reasonable time; if he does the latter he cannot put the seller in default until he has given notice of his desire to receive the goods with the offer of reasonable time for making the delivery after notice.

3. **Same; Rescission.**—Where time is the essence of the contract for the delivery of the goods, and the seller fails to deliver, the buyer is under no duty to give notice of his rescission for non delivery.

4. **Same.**—Where the buyer of goods gives notice of his rescission of the contract because of non delivery, he must rescind the contract unequivocally, and without reservation.

5. **Same; Limit of Time.**—Where delivery has not been made within the time stipulated in the contract and the buyer does not treat the contract as

[Lowy, et al. v. Rosengrant.]

broken, but evidences to the seller a purpose to continue it in force, or to reserve to himself the right to insist on its further performance at some future time, the buyer waives the time limit for delivery, and for a reasonable time thereafter, both buyer and seller are bound by the contract.

6. **Contract; Breach; Election.**—Where a contract is breached by one party, the other party thereto must elect between treating the contract as dissolved in toto, and insisting on further performance.

7. **Contract; Time; Waiver.**—Where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made, as where he recognizes the contract as still in force after the time for performance has passed.

8. **Pleading; Amendment; Discretion.**—It is discretionary with the court to allow a defendant to file pleas which are in substance amendatory statements of his defense.

APPEAL from Mobile City Court.

Heard before Hon. SAMUEL B. BROWNE.

Assumpsit by George M. Rosengrant against Max Lowy and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The first, second, and third counts sufficiently appear. The fourth count is as follows:

Plaintiff claims of defendant the further sum of \$7,000 for that, on the 30th day of April, 1914, plaintiff and defendants entered into a contract by which the plaintiff undertook to sell and defendants undertook to buy, a large quantity of red oak French claret staves, and a further large quantity of white oak French claret staves, the red oak staves to be delivered within a reasonable time after the execution of the contract, and the white oak staves to be delivered before August 1, 1914, and the plaintiff avers that the said red oak staves were delivered, and that the purchase money agreed to be paid therefor by the defendants exceeded the sum of \$7,000; that said contract contained a further provision that the defendants should retain out of the purchase price for said red oak staves the sum of \$7,000, to be held back by them until the delivery of all of the said 36-inch white oak French claret staves; and the plaintiff avers that thereafter, and before the said 1st day of August, 1914, the defendants declined to receive said white oak staves, and, further, that the plaintiff is ready and willing and has offered to deliver said white oak staves, but the defendants have declined to receive and pay therefor; and the plaintiff further avers that the defendants, nevertheless, refused to pay him said sum of \$7,000 which was due upon the purchase money of the red oak staves delivered by the

[Lowy, et al. v. Rosengrant.]

plaintiff to the defendant under said contract, wherefore the plaintiff sues.

The other facts sufficiently appear.

WEBB, MCALPINE & GROVE, for appellant. HARRY T. SMITH & CAFFEY, for appellee.

THOMAS, J.—The appellee. George M. Rosengrant, sued appellants, Max Lowy and B. A. Kobler, upon a complaint containing four counts: The first, upon account; second, for money had and received; third, for merchandise, goods and chattels sold; and fourth, in assumpsit.

The first and second grounds of demurrer to the fourth count of the complaint are directed to the failure to allege the quantity of claret staves which the plaintiff undertook to sell and deliver to the defendants; and the third, sixth, and seventh grounds, to the failure of allegation that the plaintiff was ready, able, and willing, or that he offered to deliver the staves within the contract time limit; while the fourth and fifth grounds are that from the allegations of the count the defendants had the right to decline to receive the staves.

The suit was not for a breach of the contract of purchase, but was for the recovery of a balance of the purchase price of the staves delivered by appellee and accepted by appellants as a part performance of the contract. From the purchase price of the staves so delivered and accepted on the contract, appellants had retained the sum of \$7,000 as a guarantee of future deliveries; and appellee's insistence is, that a substantial part of the contract being performed and accepted, a recovery may be had for the balance due him, on the common counts.

The fourth count alleges the making of the contract between plaintiff and defendants, for the delivery of a large quantity of claret staves, the red oak staves to be delivered within a reasonable time after the execution of the contract, and the white oak staves to be delivered before August 1, 1914; that the red oak staves were delivered, and that said contract contained a further provision "that the defendants should retain out of the purchase price for said red oak staves the sum of \$7,000, to be held back by them until the delivery of all of the said 36-inch white oak French claret staves;" and that thereafter, and before the said 1st day of August, 1914, the defendants declined to receive said white oak staves. It alleges, further, "that the plaintiff is ready

[Lowy, et al. v. Rosengrant.]

and willing and has offered to deliver said white oak staves, but the defendants have declined to receive and pay therefor." Said count also avers that the purchase price for the red oak staves so delivered by plaintiff exceeded the sum of \$7,000, and that the defendants refused to pay to plaintiff the sum of \$7,000 which was due him upon the purchase price of the red oak staves so delivered, etc.

(1) The right of a plaintiff to recover on a quantum meruit, for the balance due for the executed part of the contract, is well established.—2 Greenl. Ev. (16th Ed.) § 104; *Thomas, et al. v. Ellis, et al.*, 4 Ala. 108; *Merriweather v. Taylor*, 15 Ala. 735; *Hawkins v. Gilbert*, 19 Ala. 54; *Kirkland v. Oates*, 25 Ala. 465; *Davis v. Badders & Britt*, 95 Ala. 348, 10 South. 422; *Florence Gas, etc., Co. v. Hanby, Rec'r*, 101 Ala. 15, 13 South. 343; *Watson v. Kirby & Sons*, 112 Ala. 436, 20 South. 624; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Matthews v. Farrell*, 140 Ala. 298, 37 South. 325; *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 South. 579; *Walstrom v. Oliver-Watts Const. Co.*, 161 Ala. 608, 50 South. 46; *Smith v. Sharpe, et al.*, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52; *Dees v. Self Brothers*, 165 Ala. 225, 51 South. 735; *Montgomery County v. Pruett*, 175 Ala. 391, 57 South. 823.

This right, however, is subject to recoupment for the resulting damages to the defendant (*Ala. Chem. Co. v. Geiss*, 143 Ala. 591, 39 South. 255) that may be "a matter of easy ascertainment," or that can be calculated with "any degree of certainty" and is "susceptible of measurement by a pecuniary standard."—*Stratton v. Fike*, 166 Ala. 203, 209, 51 South. 874; *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 226, 42 South. 838; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149; *McPherson v. Robertson*, 82 Ala. 459, 2 South. 333; *Dees v. Self Bros., supra*; *Walshe Mfg. Co. v. Smith Lumber Co.*, 178 Ala. 472, 59 South. 455; 2 Paige on Contr., § 1175.

There was no error of the court in overruling the demurrers to the fourth count of the complaint that sought recovery for the balance of the purchase money of the staves delivered by plaintiff and accepted by defendants.

Defendants' amended pleas 2, 3, and 4 met the objections pointed out by the plaintiff's demurrers sustained to pleas 2 and 3 as originally filed. There was no error in the ruling of the court.

[Lowy, et al. v. Rosengrant.]

The defendants' second and third pleas as amended averred that under the terms of the contract plaintiff bound himself to deliver the staves at Mobile; that it was possible for the delivery to have been made at Mobile by plaintiff before the expiration of the contract time, but that plaintiff neither tendered nor delivered the full amount of the staves contracted for, although defendants were ready, willing, and able to receive and pay for the staves in compliance with the terms of their contract; and that this non-delivery by plaintiff, within the terms of the contract, caused loss to them of a sum in excess of that sued for. And defendants claim recoupment for such damages.

The fourth plea was of like tenor, but alleged, in addition, an extension of the time in the contract for the delivery of a portion of the white oak staves, and "that plaintiff knew at the time of the execution of said contract of April 30, 1914, that said white oak French claret staves were being purchased for the Bordeaux market in France."

The fourth replication filed to pleas 2, 3, and 4 is as follows: "And for further replication this plaintiff says that after the said 1st day of August, and on, to-wit, the 3d day of August, 1914, the defendant through his agent, notified the plaintiff in writing that he reserved the right to accept further deliveries under said contract after the expiration of the month of August, 1914, and thereby waived the time limit for such deliveries, and thereafter the plaintiff had a reasonable time within which to make deliveries to the defendant, and the defendant at no time since the month of August, 1914, notified the plaintiff that he demanded delivery within any fixed period."

(2) The failure of a seller to deliver on time confers upon the buyer the option to either treat the contract as terminated, or waive the time limit and insist on the delivery, within a reasonable time. After the buyer has waived the time limit and insisted on delivery under the contract, he cannot put the seller in default without first giving notice of his desire to receive the purchased property with the offer of reasonable time for making the delivery after notice.—*Farmers' C. O. & T. Co. v. Ward & Son*, 170 Ala. 491, 54 South. 513; *J. M. Ackley & Co. v. Hunter-Benn & Co.*, 166 Ala. 295, 51 South. 964; *Elliott v. Howison*, 146 Ala. 568, 40 South. 1018; *McFadden & Bro. v. Henderson, et al.*, 128 Ala. 221, 29 South. 640; *Stephenson v. Allison, et al.*, 123 Ala. 439, 26 South. 290.

[Lowy, et al. v. Rosengrant.]

(3-5) When the seller fails to make deliveries, and time is of the essence of the contract, the buyer is under no duty to give notice of his rescission for such non-delivery under the contract. When, however, the buyer undertakes to give notice of his rescission of the contract for non-delivery, he must rescind the whole contract unequivocally and without reservation.—*Elliott v. Howison*, *supra*; *Stephenson v. Allison, et al.*, *supra*; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. Where the party to whom delivery has not been made within the time stipulated does not treat the contract as breached, but evidences to the other party thereto, a purpose to continue it in force, or to reserve to himself the right to insist on its further performance at some future time, he waives the time limit, and for a reasonable time thereafter the respective parties are bound by the terms of the contract.—3 Elliott on Contr. § 2026, and authorities there cited.

(6, 7) One cannot claim the benefits of a contract and insist upon its further performance, and at the same time ask its dissolution. When a breach occurs, an election must be made between treating the contract as dissolved in toto, and insisting upon further performance. The choice is made once for all.—*Continental Jewelry Co. v. Pugh Bros.*, 168 Ala. 295, 53 South. 324, Ann. Cas. 1912A, 657; *Stephenson v. Allison*, *supra*; *Knight v. Turner*, 11 Ala. 636; *Dunn v. White & McCurdy*, 1 Ala. 645; *Des Allemands Lbr. Co. v. Morgan City Timber Co.*, 117 La. 1, 41 South. 332. Even where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as, for instance, where he recognizes the contract as still in force after the time for performance has passed.—9 Cyc. 608; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 450; *Brown v. Guarantee Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; *Phillips Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Amoskeag Mfg. Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715; 8 Rose's Notes U. S. Supreme Court, p. 746.

In *Thorne v. French*, 4 Misc. Rep. 436, 24 N. Y. S. 694, there was a contract between plaintiff and defendant whereby the plaintiff's opera company was to play in defendant's theater, the engagement to commence September 1st. On that date the company then playing at defendant's house was so successful that it was continued throughout the period that plaintiff's company was to play, and until the day for a third company to begin its en-

[Lowy, et al. v. Rosengrant.]

gagement. The defendant all the while recognized the contract as being in force, even though the plaintiff had not supplied the band, librettos, etc., by September 1st, as he had contracted to do; and on September 5th defendant wrote plaintiff that he would be glad to see him upon his arrival which would be in ample time for the band parts. The court affirmed the opinion of the learned judge of the equity term, in which opinion is the following statement of the law of the case: "Conceding that time was of the essence of the contract, and there was no waiver in respect thereto, the defendant had the right (1) to elect to rescind the contract for failure to deliver the materials on or before September 1, 1891; or (2) to elect to continue the contract in force. The plaintiffs, by their simple failure to deliver the materials, did not put an end to the contract, although their default might have given the right to the defendant to elect to rescind. If he elected to rescind, it was incumbent on him to make his choice promptly.

* * * By electing to continue the contract in force, the defendant retained his rights under it until September 1, 1893. He evidently intended to regard the contract as a subsisting obligation, and one that might ultimately prove beneficial to him. A defendant is not bound to take advantage of a delay or forfeiture, and there may be a waiver, if there be conduct indicating an intention to waive a condition as to time, 'although * * * there may be no technical estoppel.' * * * Where time is waived a party is not put in default until he has demanded performance, and thus restored time as an element of the contract. —*Lawson v. Hogan*, 93 N. Y. 39; *Wallman v. Society*, 45 N. Y. 485; *Leaird v. Smith*, 44 N. Y. 618; *Owen v. Evans* [134 N. Y. 514], 31 N. E. 999; *Dillon v. Masterson*, 42 N. Y. Super. Ct. 176."

In *Hennessy v. Bacon*, 137 U. S. 78, 84, 11 Sup. Ct. 17, 19 (34 L. Ed. 605), Mr. Justice Harlan states the general rule as to rescission upon breach of contract to be: "If a party means to rescind a contract because of failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties."—1 Sugden on Vendors, c. 5, § 5.

In *Dingley, et al. v. Oler, et al.*, 117 U. S. 490, 501, 6 Sup. Ct. 850, 853 (29 L. Ed. 984), the defendant, an ice dealer, had all of the year 1880 in which to make a shipment to plaintiff. Plaintiff wrote, demanding the shipment early in July of that year,

[Lowy, et al. v. Rosengrant.]

and defendant in reply answered: "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point."

The court, holding that such communication did not show a positive intention to abandon the contract so as to constitute an anticipatory breach and allow the plaintiff to sue at once, said: "Although in this extract they decline to ship the ice that season, it is accompanied with an expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs."

In *Andrews v. Tucker*, 127 Ala. 602, 612, 29 South. 34, 38, the question was as to whether there had been a waiver of the time stipulation in a contract to grade a road-bed. The court said: "By the law as it has been settled in this state, a written contract which by its term is executory as imposing the performance of duties other than the mere obligation of making payment, may, while the contract is executory in respect of any part of such duties, be altered, modified, or rescinded with or without a writing and without any other consideration than that of mutual assent. * * * And such change under such circumstances may extend to the waiver of any right either party might have had under the original contract but for the new agreement. * * * A waiver of a right to declare a contract forfeited may even be implied from conduct of the parties which is inconsistent with the intention to claim a forfeiture. Accordingly, the fact that the contract here involved was acted upon and treated by the parties as in force after the time specified therein for completion of the work undertaken by plaintiffs implied an agreement on the defendants' part not to treat the failure of completion within that time as a cause of forfeiture."

In *Brigham v. Carlisle*, 78 Ala. 243, 246 (56 Am. Rep. 28), the plaintiff had a contract with defendant whereby he was to be defendant's traveling salesman on a commission basis, his work to begin October 1st and continue eight months, but he became ill shortly before that time, and so remained until December. Late

[Lowy, et al. v. Rosengrant.]

in December defendant sent him samples and cautioned him against giving credit to certain parties. Plaintiff made his first attempt to go on the road January 1st, but his expense account was turned down and later he was ordered to send back the samples. It was declared that: "The third charge requested by the defendants based their right to abandon the contract on the naked fact, unexplained, that the plaintiff did not commence the performance of the contract until January 1, 1882. The violation of a contract by one of the parties, or when he is unable to perform the acts or services stipulated, may be sufficient to authorize the other party to abandon it. * * * Its abandonment, in such case, is at the election of the defendants; and they will be held to have waived their right to renounce the contract, when, after the delay has terminated, they regard and treat it as continuing and in force."

In *Stewart v. Cross*, 66 Ala. 22, it was held that when a written contract for the sale of lands reserves to the vendor the right of rescission if payments are not made by a designated date, this right is waived by continuing to receive partial payments on the purchase money.—*Acker v. Bender*, 33 Ala. 230; *Davis v. Robert*, 89 Ala. 402, 8 South. 114, 18 Am. St. Rep. 126; *Zirkle, et al. v. Ball, et al.*, 171 Ala. 568, 54 South. 1000.

It results from what we have said that there was no error in overruling the demurrer to the fourth replication to defendants' plea.

In *Massachusetts Mutual Life Insurance Co. v. Crenshaw*, 195 Ala. 263, 768, this court said: "These pleas offered at the last trial, with the possible exception of those of the class last above referred to, though not so denominated, were in substance amendatory statements of the defense upon which the case has been first tried; they were not additional or wholly different pleas within the purport and meaning of the rule laid down in *Jones v. Ritter*, 56 Ala. 270, and the line of cases cited in *Craig v. Pier-son Lumber Co.*, 179 Ala. 530 [60 South. 838]; they fell rather under the remedial influence of the statute of amendments, and defendant should have been allowed to place them upon the file, their legal sufficiency remaining subject to question by demurrer, unless, indeed, it appeared that in other pleas already on file defendant had the full benefit of the defense it was thus attempting to cast into new shapes."

[J. C. Walden Auto Co. v. Mixon.]

(8) It was thus discretionary with the court to allow these pleas of defendants to be filed when offered. When the trial was entered upon the plaintiff may have been prepared to disprove the fourth plea as to the "Bordeaux market in France," and not, as designated in the fifth and sixth pleas, as to the "European market."

The court committed no error in giving the plaintiff's general affirmative charge. The case is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

J. C. Walden Auto Co. v. Mixon.

Assumpsit.

(Decided April 20, 1916. 71 South. 694.)

Mortgages; Priority; Material-man's Lien.—A mortgagee in a prior recorded chattel mortgage has a claim superior to a lien for repairs upon automobiles given by § 4785, Code 1907, although the repairs were authorized by the owner then and at the time of the suit in lawful possession of the automobile, where it does not appear that the mortgagee had expressly or impliedly authorized the repairs.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

J. C. Walden doing business as the J. C. Walden Auto Company, sought to enforce a lien for repairs upon the automobile of one John P. Harrell, whereupon Travis Mixon interposed claim thereto under a chattel mortgage covering the automobile, and had judgment from which plaintiff appeals. Affirmed.

Transferred from Court of Appeals.

MARTIN & CRAWFORD, and E. S. THIGPEN, for appellant. **ESPY & FARMER**, for appellee.

THOMAS, J.—The suit was to enforce a lien for material used and labor done in the repair of a certain automobile. The claimant, Mixon, appellee on this appeal, rested his right and title on a mortgage given on the car by the owner, and duly re-

[J. C. Walden Auto Co. v. Mixon.]

corded, before the repairs were made by plaintiff. The mortgage was due and unpaid at the time of the institution of the suit and the trial. The repairs were authorized by one Harrell, who was then in the lawful possession of the car, and was in such possession at the time the suit was instituted.

Appellant asserted his lien for such material and labor on the car, and sought its enforcement under sections 4785 et seq. of the Code of 1907. Appellant further cites, as authority for the superiority of his lien for necessary repairs to that of the mortgage on the property.—*Broom, et al. v. Dale, et al.*, (Miss.) 67 South. 659, L. R. A. 1915D, 1146; *Reeves & Co. v. Russell, et al.*, 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D, 1149; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

At common law persons had the right to retain goods on which they had bestowed labor, until the reasonable charges therefor were paid.—2 Kent's Comm. 635.

It has been held that at common law a mechanic's lien for repairs under special circumstances may be superior to prior existing liens on the property. In *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761, 68 Am. St. Rep. 719, a case where a physician had executed a chattel mortgage on a buggy used by him in his practice, and thereafter had made repairs on the vehicle, such use by the mortgagor and the fact that the buggy was left in the shops of the carriage company for repairs being known to the mortgagee, the holding was as follows: "We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so."

Thus are the facts in the *Drummond Carriage Company Case* distinguished from the facts in the case for decision. Here, the mortgagee-claimant did not know that the automobile had been left for repairs, with the appellant, J. C. Walden Auto Company.

In *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615, the improvements were made on an engine belonging to the mortgagor and used in operating a railroad, by the terms of the mortgage left in the possession of the mortgagor, and after the debt became due it was still permitted by the mortgagee to remain in the possession of the mortgagor to be so used. The

[J. C. Walden Auto Co. v. Mixon.]

court held that under such circumstances the necessary implication was that the engine was to be kept in repair and by a machinist, and that such machinist would have a lien for the amount of the repairs. The repairs so made added to the value of the property and were for the benefit of the mortgagee as well as of the mortgagor.

So in the case of *Broom, et al. v. Dale, et al.*, *supra*, the automobile was in the possession of the mortgagor, and being used by him, with the knowledge and consent of the mortgagee; and such possession and use continued for a long time. In that case the mortgagee "not only knew and consented to the general use of the automobile. * * * but also had knowledge that in the course of his (mortgagor's) use of the property he was having it repaired and * * * with this knowledge made no objection to the repairs being made; * * * the repairs were such as were necessary to preserve the automobile and keep it in proper condition for its use." From these statements it will be observed that the facts on which the decisions in the *Broom* and *Watts* Cases were rested were different from the facts in the case at bar.

The statute, section 4785 of the Code, does not invest such a lien with priority over other liens. It is generally held that such a statutory lien will not take precedence of prior chattel mortgages of which the lien claimant had either actual or constructive notice at the time he performed the services, or contributed the material used, in the production, manufacture, or repair of any vehicle, implement, machine, or article, unless the mortgagee expressly or impliedly authorized the mortgagor to engage the services or material for which the lien is claimed.—*Wilson v. Donaldson*, 121 Cal. 8, 53 Pacfl 404, 43 L. R. A. 524, 66 Am. St. Rep. 17; *Rourke v. Bergevin*, 4 Idaho, 742, 44 Pac. 645; *Easter v. Goyne*, 51 Ark. 222, 11 S. W. 212; *Sims v. Bradford*, 12 Lea (Tenn.) 434; *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115; *Owen v. Burlington, C. R. & N. R. Co.*, 11 S. D. 153, 76 N. W. 302, 74 Am. St. Rep. 786; *Allen v. Becket* (Sup.) 84 N. Y. Supp. 1007; *Baumann v. Jefferson*, 4 Misc. Rep. 147, 23 N. Y. Supp. 685; *Jones*, Chat. Mortg. § 472.

It has been declared by our court that, under section 4810 of the Code, a statutory lien on a mare for the services of a stallion is not superior to a prior chattel mortgage on the mare, duly recorded so as to charge third parties with notice thereof, where

[Peoples Shoe Co. v. Skally.]

the mortgagee has in no way authorized the mortgagor to place the animal under a superior lien.—*Mayfield v. Spiva*, 100 Ala. 223, 14 South. 47. So, of section 4806 of the Code, which declares the lien of the livery stable keeper or other person feeding and caring for live stock for pay.—*Chapman v. First National Bank*, 98 Ala. 528, 13 South. 764, 22 L. R. A. 78.

Chapter 107 of the Code of 1908 provides a system of liens and for the enforcement thereof. Of this system are sections 4785, 4806, and 4810. No good reason exists why these respective statutes should not be construed to the consistent general result that no right of a superior lienholder shall be subordinated to another lien, except a tax lien, without the express or implied authority of such superior lienholder. This harmonious construction is more consonant with the reason and policy of our statutes for the creation, preservation, and enforcement of the many different liens dealt with in chapter 107 of the Code.

The affirmative charge was properly given for the claimant in the court below, appellee here, and the cause is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Peoples Shoe Co. v. Skally.

Assumpsit.

(Decided April 20, 1916. 71 South. 719.)

1. **Master and Servant; Discharge; Salary; Mitigation.**—Where an employee sued for compensation after wrongful discharge, pleas attempting to set up a defense that plaintiff could have received compensation in other employment which purported to be pleas in bar of the action, not stating expressly or by fair implication that they were pleas in abatement or mitigation of damages, were subject to demurrer, since a plea must answer all it professes to answer.

2. **Pleading; Sufficiency; Answering Part.**—A plea professing to answer the whole declaration, but which in fact answers only one count thereof, is bad on demurrer.

3. **Same.**—A plea which assumes to answer the whole declaration, but which omits to answer a material part thereof, is bad on demurrer.

4. **Master and Servant; Compensation; Reduction.**—When sued for wrongful discharge, an employer may reduce the amount of recovery by

[Peoples Shoe Co. v. Skally.]

showing that the servant obtained other employment, or might have done so by the exercise of reasonable diligence, but he cannot use the fact to defeat entirely the servant's cause of action.

5. **Damages; Mitigation.**—Matter in mitigation of damages is admissible under the general issue.

6. **Appeal and Error; Harmless Error; Pleading.**—Where matter is available under the general issue, any error in sustaining demurrer to special pleas setting up such matter is harmless.

7. **Same.**—Where a certain part of a plea is good only in reduction of damages, but is not good as a bar to the action, such matter is available under the plea of general issue, and its elimination from the plea by motion to strike is harmless.

8. **Same; Striking Plea.**—Any error in striking special pleas is rendered harmless where the matters therein contained are available under the general issue.

9. **Charge of Court; Directing Verdict.**—Where evidence is in conflict as to the material facts upon which the right of recovery depends, the court cannot properly direct the verdict.

10. **Trial; Objection to Evidence; Time.**—Unless the questions are answered before counsel has an opportunity to object, objections not made until after the questions are answered, came too late.

11. **Witnesses; Impeachment.**—After proper predicate laid it is competent to show that the general manager of defendant company, a witness in the case, the defense depending on his testimony, had been talking with the witnesses in the case, asking them as to what they would testify, what the witnesses had told defendant's counsel, and that the manager told the witnesses they should or must change their testimony.

12. **Same.**—A predicate is required before a witness can be impeached by contradictory statements, to prevent surprise and give him an opportunity to explain; if his attention is called to the time and place, circumstances and persons involved, and the statements made, the rule is satisfied.

13. **Same.**—A witness cannot defeat the introduction of contradictory statements offered to impeach him by stating that he does not remember, etc.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Action by John Skally against the People's Shoe Company. From a judgment for plaintiff, defendant appeals. Transferred from the Court of Appeals under section 6, Act April 18, 1911, p. 450. Affirmed.

The declaration was upon breach of contract of employment. The pleas were: The general issue. Plaintiff left the employment of the defendant of his own free will and accord on July 1, 1914, and was not discharged; left such employment without cause on the part of the defendant. That after plaintiff ceased to work for defendant plaintiff did obtain other employment in the same line and character of work and business in which he

[Peoples Shoe Co. v. Skally.]

was theretofore employed by defendant, and in the same community in which plaintiff was theretofore employed by defendant, at a salary of \$100 per month, and worked at such employment for a period of one month. That after plaintiff worked in the employment of defendant plaintiff went into business for himself in the same community in which he was theretofore employed by defendant, from which said business plaintiff realized the sum of \$500. Plaintiff could have, by the exercise of reasonable effort and diligence, obtained employment of the same character in which he had theretofore been employed by defendant and in the same locality and community from the time he ceased to be an employee of defendant. J. L. Cawthon was being examined as a witness; he being the president of the People's Shoe Company. He was asked: "Now, didn't you have a conversation with Mr. McAtee in your store after he had been over to Mr. Armbricht's office, Mr. Armbricht being your attorney, in which you inquired as to what he had told Mr. Armbricht, and when Mr. McAtee told you, in substance, that he told Mr. Armbricht he had a contract by the year, that you then told him that would be throwing you down, and he must go to Mr. Armbricht and change his testimony?"

This question was also propounded as to other witnesses, and, after objection overruled, the witness answered: "No." These witnesses were introduced in rebuttal and asked if such conversation took place between them and Mr. Cawthon, and, after objection overruled, the witnesses answered: "Yes." The charges sufficiently appear.

ARMBRECHT, WHITE & McMILLAN, for appellant. LEIGH & CHAMBERLAIN, and STEVENS, MCCORVEY & McLEOD, for appellee.

MAYFIELD, J.—This is an action by an employee to recover the salary or compensation he would have received for six months' service but for the alleged wrongful discharge by the employer. The trial was had on the general issue and special pleas setting up the fact that plaintiff voluntarily quit the employment, and that he was not wrongfully discharged. The defendant also filed several pleas, attempting to set up the defense that the plaintiff did receive, or could have received, similar or like employment in the same community, and received, or could have received, ample or full compensation for his services, and that he was therefore not damaged if discharged as alleged.

[Peoples Shoe Co. v. Skally.]

(1) Demurrers were sustained as to these pleas, and the first assignments of error go to these rulings of the court. These pleas were each clearly subject to the demurrer interposed. They profess or purport to be pleas in bar of the entire action, and not in abatement, or in mitigation of damages. Counsel for appellant are in error in concluding that the pleas do not profess or purport to answer the entire cause of action alleged, but go only in bar of a part, or in mitigation of damages. If they were intended as such by the pleader, the pleas should have said so, either expressly or by fair implication. Counsel for appellant concede that the law and a rule of pleading is that a plea must answer all it professes to answer; but they say these pleas do this. As we have said above, we do not agree with counsel in this construction of the pleas.

(2) A plea professing to answer the whole declaration, and which answered only one count, will be adjudged bad on demurrer.—*Adams v. McMillan, Ex'r*, 7 Port. 75; *Tomkies, et al. v. Reynolds*, 17 Ala. 109; *Wilkinson v. Moseley*, 30 Ala. 562.

(3) So a plea assuming to answer the whole declaration, but omitting to answer a material part, is bad on demurrer.—*Standifer v. White*, 9 Ala. 527; *Mills & Co. v. Stewart*, 12 Ala. 90; *White v. Yarbrough*, 16 Ala. 109.

(4) "The defendant may reduce the amount of recovery by showing such other employment, or that plaintiff might have obtained other employment by the exercise of reasonable diligence; but these facts could not be used to defeat entirely plaintiff's cause of action.—*Wilkinson v. Black*, 80 Ala. 329; *Morris & Co. v. Knox*, 96 Ala. 320, 11 South. 207; *Troy Co. v. Logan*, 96 Ala. 619, 12 South. 712."—*Fitzpatrick, etc., Co. v. McLaney*, 153 Ala. 586, 592, 44 South. 1023, 127 Am. St. Rep. 71.

(5, 6) Moreover, if the pleas were intended as counsel for appellant contend—that is, in mitigation of damages—such matter was admissible under the general issue, and the record shows that this matter was litigated under the general issue; hence, if error, it would be without possible injury.

(7) Where a certain part of a plea is good only in reduction of damages, but not as a defense in bar, whether such matters are properly stricken from the file, if stricken on motion, is immaterial, for the reason that the matter would be available under the plea of the general issue, and, if so, its elimination from the plea by motion to strike would be without injury.—*Hayes v.*

[Peoples Shoe Co. v. Skally.]

Miller, 150 Ala. 621, 43 South. 818, 11 L. R. A. (N. S.) 748, 124 Am. St. Rep. 93.

(8) Error is without injury in striking special pleas when the matters contained therein are available under the general issue.—*N. C. & St. L. Ry. v. Karthaus*, 150 Ala. 633, 43 South. 791.

The master who wrongfully discharges his servant is liable in an action by the servant whether the latter obtain or fail to obtain other employment, but the master may reduce the recovery by proof of other employment or that the servant might have obtained other employment by reasonable diligence.—*Fitzpatrick, etc., Co. v. McLaney, supra*; *Wilkinson v. Black, supra*; *Morris v. Knox, supra*, 96 Ala. 320, 11 South. 207; *Troy v. Logan, supra*.

The real dispute between the parties was of questions of fact: First, whether or not there was a contract of employment from July, 1914, to January, 1915; and, second, whether or not the defendant in fact discharged the plaintiff.

(9) There is no contention that there was any justification for the discharge, nor that plaintiff quit the service. The defendant contends: First, that the employment was by the month, and not by the year, as plaintiff claims; and, second, that plaintiff was not discharged, but left the service voluntarily. While there is some difference as to other questions, the two above mentioned were the main controverted facts upon which the right of recovery depended. The evidence was clearly in dispute as to both of these questions, and therefore the court correctly declined to peremptorily instruct the jury to find for the defendant, or to give the affirmative charge with the usual hypothesis. The trial court, at the request of the defendant, instructed the jury as follows: "The court charges the jury that, if they believe from the evidence that the plaintiff voluntarily left the employment of the defendant without fault on the part of the defendant, they cannot find a verdict for the plaintiff."

"The court charges the jury that, if they believe from the evidence that the defendant offered to keep the plaintiff in his employ after July 1st until the plaintiff could secure another job at similar employment in the same line of business in the same community at a rate of salary satisfactory to the plaintiff, plaintiff cannot recover."

[Peoples Shoe Co. v. Skally.]

"The court charges the jury that, unless they believe from the evidence that the plaintiff and the defendant entered into a definite contract whereby the plaintiff agreed to serve the defendant and the defendant agreed to employ the plaintiff for a definite term ending December 31, 1914, they must find for the defendant."

These charges were certainly as favorable to the defendant as it had a right to receive.

(10) There is a great number of assignments of error as to rulings on the evidence. It is unnecessary to treat them separately. Suffice it to say the entire record has been carefully reviewed and each objection and exception examined separately, and that we find no reversible error in any of the rulings. Many of the objections to questions propounded to the witnesses were not made until after the question was answered, and hence came too late; there being nothing to show that the question was answered before counsel could interpose objection. Neither parties nor counsel are allowed to speculate on the answer before interposing an objection to the question. Moreover, there was no motion to exclude the answer in several instances. As to the exceptions based on the sustaining of plaintiff's objections to questions propounded to witnesses, they are each without merit, or it was not shown that the answer would be material or relevant; the questions themselves not being such in their nature to show the competency or relevancy of the proposed answers. We feel sure that, if there could be said to be error in any one of the specified rulings on exceptions, this record shows that it was without injury to this appellant.

(11) It was certainly competent for plaintiff to prove that the general manager of defendant company had been talking with the witnesses in the case, and asking them as to what they would testify, and what the witnesses had told defendant's counsel, and that the general manager told the witnesses they ought to or must change their testimony. Such matters were certainly admissible when the defendant's president or general manager was a witness in the case, and the defense depended almost entirely upon his testimony. There was no such discrepancy between the predicate laid when the president or manager was on the stand and the questions propounded to the witnesses as to what was said and done by the former as to render the evidence inadmissible. It appears from the record with reasonable cer-

[Rice v. Beavers & Co.]

tainty that the predicate informed the witnesses of the times, places, and occasions, as well as of the matters inquired about.

(12) In order to impeach a witness by contradictory statements, a predicate is required to prevent surprise and give the witness an opportunity to explain. If the attention of the witness is called to the time and place, circumstances and persons involved, and the statements made, the rule is satisfied. It does not require a perfect precision as to either.—*Southern Railway Co. v. Williams*, 113 Ala. 620, 21 South. 328. See *Carlisle v. Hunley, Ex'x*, 15 Ala. 623; *Lewis v. Post*, 1 Ala. 65; *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *Powell v. State*, 19 Ala. 577; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442.

(13) A witness cannot defeat the introduction of contradictory statements offered for the purpose of impeaching him by stating that he does not remember, and the like answers.—*Southern Ry. Co. v. Williams*, 113 Ala. 620, 21 South. 328; *Brown v. State*, 79 Ala. 61; 4 Mayf. Dig. p. 1198.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Rice v. Beavers & Co.

Assumpsit.

(Decided April 20, 1916. 71 South. 659.)

1. **Time; Compensation.**—Under § 11, Code 1907, in calculating the time as fixed by a statute within which an act may be done, the first day is excluded, and the last day included.

2. **Same; Within.**—The use of the word “within” as a limit of time or degree or space, embraces the last day or degree, or entire distance fixed, or covered by the limit.

3. **Bill of Exceptions; Presentation; Time.**—Where bill of exceptions was presented 92 days after judgment entered, it was not presented within the time required by § 3019, Code 1907, and on motion must be stricken.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Action by J. H. Beavers & Co., against Elver L. Rice. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from Court of Appeals.

[Wallace v. Crosthwait.]

W. G. PEEBLES, for appellant. J. B. POWELL, for appellee.

THOMAS, J.—(1, 2) The cause is submitted on motion to strike bill of exceptions, because not presented to the trial judge within the time required by law. When a statute fixes a time within which an act may be done, the first day must be excluded and the last day included, to compute it.—Code 1907, § 11; *Oberhaus v. State, ex rel. McNamara*, 173 Ala. 483, 55 South. 898. Bills of exceptions may be presented at any time “within ninety days from the date on which judgment is entered and not afterwards.”—Code 1907, § 3019. The use of the word “within,” as a limit of time, or degree, or space, embraces the last day, or degree, or entire distance, covered by the limit fixed.—*Hamilton v. State*, 101 Tenn. 417, 47 S. W. 695.

(3) The judgment in this case was entered on May 19, 1915, and the bill of exceptions was presented on the 19th day of August, 1915, 92 days after the entry of the judgment. The motion to strike the bill of exceptions is granted, and the bill of exceptions is stricken. There being nothing before the court for review, the cause is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Wallace v. Crosthwait.

Assumpsit.

(Decided April 20, 1916. 71 South. 666.)

1. **Appeal and Error; Review; Exceptions; Necessity.**—Where the trial is by the court without a jury, either party may by bill of exception present for review the judgment of the trial court on the evidence without an exception thereto, and if error is discovered, the appellate court may proceed to render such verdict as should have been rendered, or may reverse and remand.

2. **Frauds; Presumption and Burden of Proof.**—The law does not presume fraud, and when the charge of fraud is made, it must be established by the evidence before relief can be had.

3. **Sales; Remedy of Buyer; Evidence.**—The evidence in this case examined and held insufficient to show the bale of cotton was water packed or

[Wallace v. Crosthwait.]

plated, but rather to show that it was sold as damaged cotton without fraud, and hence, nor authorizing a recovery under § 3734, Code 1907.

4. **Words and Phrases; "Water Packed."**—A water packed bale of cotton is one to the lint of which water is added in such a manner that the weight is increased, or in which water damaged cotton was placed, or the sampling sides of which are packed with cotton not so wet or water damaged. If, however, the seed cotton entering into the bale was merely green or damp when ginned and pressed, and no water or moisture, or other extraneous matter is added by human agency, such bale is not fraudulent or water soaked.

APPEAL from Lawrence Circuit Court.

Heard before Hon. A. H. ALSTON.

A. J. CROSTHWAIT sued W. C. Wallace to recover the purchase price of a bale of cotton, and had judgment from which defendant appeals. Reversed and rendered.

Transferred from Court of Appeals.

W. T. LOWE, for appellant. J. M. IRWIN, for appellee.

THOMAS, J.—The suit was by plaintiff, appellee here, for the recovery of the purchase price of a bale of cotton sold to him by defendant. The gravamen of count 3 was that said bale of cotton was "water-packed," that this fact was unknown to plaintiff buyer at the time of the purchase, and that on account of such condition plaintiff suffered the damages. The cause was tried by the court without the intervention of a jury. The special finding of fact was "that the bale of cotton in controversy was water-packed," and judgment was entered for plaintiff.

(1) In the trial of a cause without a jury either party may by bill of exceptions present for review by this court the judgment of the trial court on the evidence, without an exception thereto; and this court will review such finding. If there is error, such judgment will be here rendered as the court below should have rendered, or the cause may be reversed and remanded for further proceedings in the lower court.

(2, 3) The warranty on sale of a bale of cotton by the planter is thus declared by statute (Code 1907, § 3734): "When cotton in bales is sent by a planter or other owner to a factor for sale, a warranty is implied on the part of such planter or owner to the factor, and the purchaser from such factor, respectively, that such cotton is not fraudulently packed; and when cotton is sold by sample by the owner or his factor, that the sample has been

[Wallace v. Crosthwait.]

fairly drawn, and that the cotton is not fraudulently packed, and no other warranty is thereby implied; and for any breach of such implied warranty, the purchaser may recover damages, either from the owner or factor selling the same; but no action can be brought for any breach of such last mentioned implied warranty, unless the suit is commenced within one year after such sale; but planters shall not be liable, in any way, for losses sustained by factors or commission merchants for having sold cotton by fraudulent or unfair samples, unless such loss was occasioned by plating or fraudulent packing of the cotton by such planter."

The law does not presume fraud, and, when a charge of fraud is made as a fact, and it is denied, it must be established by the evidence before relief can be had. If the facts and circumstances from which the alleged fraud is supposed to arise may be reasonably consistent with honest intentions, fraud will not be imputed.—*Thames v. Rembert*, 63 Ala. 561; *Harrell v. Mitchell*, 61 Ala. 270, 281; *Allen v. Riddle*, 141 Ala. 621, 37 South. 680; *Morris & Co. v. Barton & Allen*, 180 Ala. 98, 60 South. 172; *Henderson v. Gilliland*, 187 Ala. 268, 65 South. 793.

(4) Cotton is one of the chief products of agriculture in this state, and from its preparation for market and sale have come the expressions "plated," "sand-packed," and "water-packed," each with well-understood meaning.—*Daniel v. State*, 61 Ala. 4. A civil and a criminal statute have been enacted to prevent the fraudulent packing of bales of cotton by "plating or otherwise."—Code 1907, §§ 3734, 6683. When cotton is "ginned and packed" into a merchantable bale, the warranty is implied that the lint coming from the gin has not been so dealt with or manipulated as to fraudulently increase its weight, that wet or damaged staple has not been placed therein, and that the sides of the bale from whence the sample is to be taken have not been plated with a better staple.

A "water-packed" bale of cotton is one to the lint of which water was added in such manner that the weight was increased, or in which water-damaged cotton was placed, or the sampling sides of which were plated with lint cotton not so wet or water-damaged. In other words, if water was added to the lint cotton before or at the time it was pressed into a bale, or wet or water-damaged cotton was concealed therein, such a bale is water-packed. If, however, the seed cotton entering into the bale was

[Wallace v. Crosthwait.]

merely "green" or damp when ginned and pressed, and no water or moisture or other extraneous matter was added by human agency, such a bale could not be said to be a fraudulent or a water-packed bale of cotton.

We have carefully followed the evidence on which the special finding of the trial court was rendered. With frankness of statement the plaintiff, the ginner of the bale of cotton in question, and the defendant, have detailed the facts. There is little if any conflict in the testimony. The cotton was ginned at Moulton, placed on defendant's wagon, and immediately sold to plaintiff, who was an experienced buyer. Plaintiff states that he bought the cotton on his own judgment, from the samples that he took from the bale; that he knew it was bad when he bought it; that the defendant did not bring him a sample, and made no representations concerning the cotton; and that after its purchase he allowed it to lie on the platform, without shelter, for 35 or 40 days, when he sold it to Mr. Jones, who "some time after" resold it to a factor in Decatur, who "later" discovered its damaged condition. The record does not disclose the length of time that elapsed from its purchase by plaintiff to the discovery of its condition at the compress in Decatur.

The seed cotton was "bad and damp" when offered to Mr. Prince to be ginned. The defendant then carried it to Moulton, where it was ginned by Mr. Long, who testified that the cotton was ginned from defendant's wagon, and just as other cotton was ginned; that it was conveyed by suction pipes to the gin, and that the lint was conveyed by machinery to the press; that it was not handled other than by machinery in this process; that the bale could not have been "water-packed" without stopping the gin and subjecting it to water while the machinery was standing; that he did not water-pack the bale of cotton; and that defendant "did not handle or have anything to do with the bale of cotton from the time it left the wagon until it was rolled out from the press, when he put it on the wagon and drove away."

The counts for deceit were unsupported by the evidence, and judgment thereon must be for the defendant.—*Scott v. Holland*, 132 Ala. 389, 31 South. 514.

After a careful consideration of the evidence we are of opinion that the great weight of the evidence shows there was no deceit or breach of warranty or bad faith on the part of the seller towards purchaser, and that the bale of cotton was not, in

[Temple v. Dooley.]

fact, water-packed. The reasonable view of the transaction, and the view consistent with honest intention, is that the cotton was carried to the gin by the seller, where, without change in its condition, it was ginned and packed, and was afterwards purchased by plaintiff; that it was of the last of defendant's crop, and for this reason was of inferior grade, and perhaps "frost-bitten," and that it was purchased as such inferior or damaged grade of cotton; that after its purchase the buyer allowed it to remain exposed to the weather for a month or more, and that its deterioration occurred while in the possession of a subsequent purchaser.

The court committed error in finding from the evidence that the bale was water-packed, and in rendering judgment for the plaintiff.

Judgment is here rendered for the defendant, and the appellee is taxed with the costs in this court and in the lower court.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Temple v. Dooley.

Assumpsit.

(Decided April 20, 1916. 71 South. 683.)

1. **Appeal and Error; Judgment to Support; Dismissal.**—Where there is no valid judgment from which an appeal may be taken, the court will of its own motion dismiss the appeal.

2. **Same.**—Under § 2841, Code 1907, the giving of an affirmative charge as to a plea in abatement to a landlord's attachment, can be reviewed on appeal, provided the appeal be taken with the consent of the opposite party, such consent being a condition precedent, and jurisdictional.

3. **Same; Sufficiency of Judgment Below; Waiver.**—The question of the sufficiency of the judgment or decree of the lower court to support an appeal is jurisdictional, and cannot be waived.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Attachment by L. P. Dooley against T. T. Temple to enforce a landlord's lien for rent. The court directed a verdict for plain-

[Temple v. Dooley.]

tiff on trial of defendant's plea in abatement, and defendant appeals. Appeal dismissed.

Transferred from Court of Appeals.

MCCORD & ORR, for appellant. STREET & BRADFORD, for appellee.

THOMAS, J.—The questions presented in the assignment of errors arose in the trial of an attachment, sued out by a landlord against his tenant, to recover an amount due for rent and advances. The ground for the attachment was that the defendant-tenant had removed from the premises a part of the crop raised on the rented premises, without paying the rent and advances, or either, and without the consent of the landlord. Defendant interposed a plea in abatement, that the alleged ground for the attachment did not exist. At plaintiff's request, the court gave the affirmative charge on trial of defendant's said plea. There was verdict and judgment for the plaintiff on this issue, and from this finding the defendant appeals. There was no final judgment in the cause.

(1) There must be a valid judgment from which an appeal may be taken, to support the appeal. If there be none such, the court will of its own motion dismiss the appeal.—*Gunter v. Mason*, 125 Ala. 644, 27 South. 843.

(2) Certain interlocutory judgments, rendered before the final determination of the cause, will support an appeal to the Supreme Court if the record affirmatively shows that the appeal is within the terms of the statute (section 2841 of the Code of 1907). Interlocutory judgments overruling a motion to dismiss or quash an attachment, or sustaining a demurrer to a plea in abatement to an attachment or sustaining an attachment against matters set up in abatement of it either in the way of an agreed case or by plea or otherwise, may be reviewed on appeal, provided the appeal be taken with "the consent of the opposite party or his attorney." No such consent of the plaintiff or of his attorney is shown by the record. Such consent is a condition precedent, and is jurisdictional.—*Stanton v. Heard*, 100 Ala. 515, 14 South. 359; *Crumley Bros. v. Bryan & Co.*, 69 Ala. 91. Appeals are of statutory creation. Authority for the appeal in each case must be found in the statute.—*May v. Courtney*, 47 Ala. 185; *Stoutz, Adm'r, v. Huger*, 107 Ala. 248, 18 South. 126.

[*Berthold & Jennings Lbr. Co. v. Geo. W. Phalin Lumber Co.*]

(3) The question of the sufficiency of a judgment or decree in the lower court to support an appeal is jurisdictional and cannot be waived.—*Meyers, et al. v. Martinez, et al.*, 162 Ala. 562, 50 South. 351. The judgment from which this appeal is taken is not such as will support an appeal to the Supreme Court, without the consent of the plaintiff or his attorney. The record failing to show affirmatively such consent in this case, there is no statutory authority for the appeal, and this court is without jurisdiction.—*Bennett, et al. v. Hall*, 193 Ala. 273, 69 South. 136.

The appeal is dismissed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Berthold & Jennings Lbr. Co. v. Geo. W. Phalin Lumber Co.

Assumpsit.

(Decided June 1, 1916. 71 South. 989.)

Continuance; Discretion; Statute.—Where an action was instituted by attachment July 7, and complaint was filed Nov. 13, thereafter, three days before the first day of the term, or six days before the return of the attachment, or the time when the complaint was required to be filed, while defendant could have made demand on plaintiff for bill of particulars at any time after the suing out of the attachment, the refusal of the court to grant defendant's motion for a continuance made Nov. 18, after having demanded bill of particulars, under § 5326, Code 1907, on Nov. 14, was not an abuse of discretion.

APPEAL from Tuscaloosa Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Attachment by the Geo. W. Phalin Lumber Company against Berthold & Jennings Lumber Company. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from Court of Appeals.

W. J. MONETTE, for appellant. H. A. & D. K. JONES, for appellee.

THOMAS, J.—The plaintiff, appellee, instituted this action against the defendant, Berthold & Jennings Lumber Company,

[*Berthold & Jennings Lbr. Co. v. Geo. W. Phalin Lumber Co.*]

by attachment sued out in the circuit court on the 7th day of July, 1914. On that day the writ was levied on defendant's property in the county where the suit was instituted. On July 10, 1914, defendant executed a replevy bond for the property, and on the approval of the bond by the sheriff the property was, on July 11, 1914, returned to defendant. Three days before the first day of the court (November 13, 1914) plaintiff filed its complaint in the attachment suit. On November 14, 1914, defendant demanded a list of the items composing the account under section 5326 of the Code of 1907, and on November 18th thereafter, plaintiff filed in the cause and furnished defendant's counsel a specific list of the several items of the account, the foundation of the suit, aggregating 11,772 feet of lumber, of the aggregate value of \$364.93, and subsequently amended the list or account by the allowance of credits which left the balance due thereon, as \$53.20. Of the same date (November 18th) is the defendant's motion, duly verified, asking for a continuance on the several grounds specified therein. The motion for a continuance was denied by the court; and the exception to this ruling, reserved by the defendant, is properly presented by bill of exceptions.—*Hayes v. Woods*, 72 Ala. 92. And this ruling is the basis for the only assignment of error on this appeal. The statute under which the bill of particulars was demanded in this case (Code, § 5326) is as follows: "No profert of a sealed instrument is required in pleading, but, at any time previous to the trial, the defendant may have inspection of the bond or other instrument sued on, upon notice to the attorney of the party; or when an account is the foundation of the suit, a list of the items composing it."

Obviously, the object of the statute was to prevent surprise and to acquaint the defendant with the matter of the claim against him (*Pollack v. Gunter, et al.*, 162 Ala. 317, 50 South. 155), and, under the recent amendment thereof, to acquaint the plaintiff with the nature of the defendant's set-off, whether it be an "instrument relied on," or items composing a counter demand.—Gen. Acts, 1915, p. 597. In the *Pollack Case*, *supra*, the object of the statute, it was declared, refuted the existence of a legislative purpose to make the requirements of the statute "more strict than the ordinary rules of pleading," and the effect of the ruling was to permit the dates set out in the bill of particulars to be varied by evidence on the trial of the true dates when the serv-

[*Berthold & Jennings Lbr. Co. v. Geo. W. Phalin Lumber Co.*]

ices were rendered or items furnished. So in *M. & B. R. R. Co. v. Worthington*, 95 Ala. 598, 10 South. 839, where the question was of the sufficiency of the bill of particulars furnished, Chief Justice STONE gave the statute a liberal construction, and it was held that the items, "corn, oats and bran, consumed," permitted proof of the necessity, in the construction of such trestling, to raise heavy timbers by the use of teams. A like liberal construction was given the statute in each of the cases of *Fountain v. Ware*, 56 Ala. 558, and *Robinson v. Allison*, 36 Ala. 525. The office of the bill of particulars and list comprising the items of the suit is stated in 31 Cyc. 565, to be: "To inform the opposite party and the court of the precise nature and character of the cause of action or defense for which the pleader contends in respect to any material or issuable fact in the case, and which is not specifically set out in his pleadings, and which cannot, in many cases, be proven in the pleadings without great perplexity. It is properly an amplification of the pleading, designed to make more specific general allegations appearing therein and thus avoid a surprise at the trial."

This statement of the rule is largely rested on the opinion of Mr. Justice DOWDELL (later Chief Justice), in *Morrisette, Ex'r, v. Wood*, 128 Ala. 505, 30 South. 630, and 3 Eng. Pl. & Pr. 519. This court has often held that the trial court will not be put in error because of its ruling upon a motion for a continuance unless gross abuse of discretion is shown.—*McLaughlin v. Beyers*, 175 Ala. 544, 57 South. 716; *Kelly v. State*, 160 Ala. 48, 49 South. 535; *Ala. Co. v. Wrenn*, 136 Ala. 475, 34 South. 970; *White v. State*, 86 Ala. 69, 5 South. 674.

The statute required the plaintiff, within three days of the return of the attachment, to file his complaint, and when so filed, "the cause stands for trial at such return term," if the levy was made and notice thereof was given 20 days before the commencement of such term.—Code 1907, § 2961. The record shows that the complaint was filed three days before the first day of the term, or some six days before the return of the attachment, or before the complaint was required to be filed. The cause had been long pending, and the defendant could, at any time after the suing out of the attachment on the 7th of July, have made demand on the plaintiff in attachment for the bill of particulars, and, failing in this, did not show any gross abuse of the discretion of the court in not granting his motion for a continuance.

[Meador & Son v. Standard Oil Co.]

Any other rule would prevent the trial of attachment suits at the time to which they are made returnable by the statute.—Code § 2961.

The cause is affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Meador & Son v. Standard Oil Co.

Assumpsit.

(Decided May 18, 1916. 72 South. 34.)

1. **Evidence; Declaration of Agents; Corporations.**—Declarations of agents of a corporation are not competent evidence against a principal, unless made while in the discharge of their duties in and about the particular transaction, and within the scope of their authority, so as to constitute a part of the *res gestae*.

2. **Same; Breach of Warranty; Res Gestae.**—Where the action was by a corporation for the price of gasoline, and the defense was breach of warranty as to quality, declarations of agents of the corporation made subsequent to the sale are not part of the *res gestae* and are inadmissible.

3. **Sale; Breach of Warranty; Evidence.**—Where the action was for the purchase price of gasoline, and the defense was for breach of warranty as to quality, evidence that the gasoline was not of the quality warranted, and that the vendor was notified of that fact and given an opportunity to make his warranty good is admissible.

APPEAL from Marengo Law and Equity Court.

Heard before Hon. EDWARD J. GILDER.

Assumpsit by the Standard Oil Company against D. J. Meador & Son. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under Act April 18, 1911 (Laws 1911, p. 450) § 6. Affirmed.

The complaint was on the common counts. Plea A set up certain payments and credits as an offset against plaintiff's demand. The other pleas set up the fact that defendants were operating a sawmill and public gin, and used gasoline as a motive power to run their engine, and that they did buy gasoline from plaintiff for the purpose of running their engine, which fact was well known to plaintiff, and the purposes for which it would be used, and notwithstanding this fact plaintiff shipped to defendant

[Meador & Son v. Standard Oil Co.]

gasoline so impure and so adulterated with some other mixture unknown to defendant that their ginnery and mill was shut down for a long period of time, because of the fact that they were unable to operate the engine with the gasoline furnished by plaintiff, and that defendants had no knowledge of that fact, and did not discover the impurity of said gasoline for some time, and until December 28, 1911. They offer to set off the interest on the value of the ginnery and outfit during that period, claiming the same to be \$3,000 and interest thereon of \$60. Other pleas set up the same state of facts and allege additional and other damages. Objections to evidence sufficiently appear.

I. L. CANTERBURY, and TYSON & ARRINGTON, for appellant.
J. M. MILLER, for appellee.

MAYFIELD, J.—There is but one assignment of error in this case, and it raises the only disputed question of law involved in the trial. The assignment is as follows: "The court erred in sustaining plaintiff's objection to the following question to witness Edwin Meador: 'I will ask you whether or not any complaints were made to the Standard Oil Company or their agents during the season of 1911 and 1912 as to the impurity of the gasoline.'"

(1, 2) Some of the questions propounded to the witness, Edwin Meador, and to the defendant's agent, Green, called for illegal evidence—that is, for the declarations of a sales agent, and conversations between Meador and the agent, after the sale was consummated. This, of course, was not binding on the defendants; the acts or conversations not being a part of the *res gestæ* of the sale, and not leading up to it. The rights and the liabilities of both parties, under the contract of sale, were fixed before these conversations were had, and the agent, Green, is not shown to have had authority to bind his principal by his subsequent declarations. Statements or declarations made by an agent are not admissible in evidence when they relate to transactions that are past.—*Seaboard Air Line Ry. v. Hubbard*, 142 Ala. 546, 38 South. 750. Declarations of the agents or officers of a corporation are not competent evidence against the principal, unless made within the scope of his authority and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gestæ*.—*Bessemer Coal & Iron*

[Meador & Son v. Standard Oil Co.]

Co. v. Doak, 152 Ala. 166, 44 South. 627, 12 L. R. A. (N. S.) 389. The admissions or declarations of an agent, when made at the time of doing an act in the execution of his authority, are binding on the principal.—*Belmont Coal & R. Co. v. Smith*, 74 Ala. 206; *A. G. S. R. Co. v. Hill*, 76 Ala. 303. But to render the declarations or admissions of the agent evidence against or binding on the principal, they must be explanatory of some contemporaneous act within the scope of his authority, or must be made while in the execution of the agency, forming a part of the *res gestæ*.

(3) The issue being as to the sale of gasoline, which was claimed by the defendant vendee to be of a bad quality, and therefore a breach of warranty as to quality, and the defendant seeking a set-off or recoupment on this account, it was, of course, competent for defendant to prove that the goods were not of the quality warranted, and that the vendor was notified of the fact, and given an opportunity to make his warranty good.—*Baer v. Mobile, etc., Co.*, 159 Ala. 491, 49 South. 92; Benjamin on Sales (7th Ed.) pp. 950, 961; Mechem on Sales, § 1811, p. 1447. If the court had declined to allow such proof, it would, of course, have been error; but we do not so read the record. The defendant did introduce proof to the effect that defendant complained of the quality of the gasoline sold him, and demanded that the vendor make it good. In fact, it was conceded by the plaintiff that defendant did make complaint, and demand remuneration for the breach of warranty. Moreover, the witness Edwin Meador was allowed to testify to all the competent matters that the question propounded to him, and assigned as error, would have elicited. The fact that complaint was made by the vendee of the bad quality of the goods, and that the defendant claimed damages for the alleged breach of warranty, seems to be a conceded fact; consequently, if there was any error as to the rulings complained of, they were without possible injury.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Daniel v. Hughes.]

Daniel v. Hughes.**Assumpsit.**

(Decided June 1, 1916. 72 South. 23.)

1. **Compromise and Settlement; Consideration.**—The existence of a mere controversy is not sufficient to support a contract based upon the settlement of the controversy, unless based upon some consideration in the shape of something beneficial to one party, or detrimental to the other.

2. **Same; Merits of Controversy.**—Whether its legal validity is known or not, a claim without legal merit and absolutely and clearly not sustainable in law or equity cannot constitute a legal consideration for a compromise and settlement.

3. **Same; Action; Complaint.**—A count alleging that plaintiff held a claim against defendant in the sum of \$1,500 for the breach of an agreement, and a promise by defendant to pay plaintiff \$900, in consideration of the settlement of the controversy, which plaintiff accepted, but which defendant has failed to pay, and another count alleging the controversy regarding the claim against defendant by plaintiff for a commission for selling lands, whereby defendant was to pay \$900, at a certain place, and defendant's failure to meet plaintiff at the appointed place, and his failure to pay, were demurrable for failing to aver that defendant owed plaintiff anything upon the matter out of which the controversy arose, or any fact showing that the controversy was supported by a valuable consideration.

4. **Pleading; Construction on Appeal.**—In determining whether a count of a complaint to which demurrers were improperly overruled, is sufficient to support a judgment, the appellate court will give it a liberal construction, and resolve all reasonable inferences in favor of the count, as stating a cause of action, and will infer that the pleader charged such a controversy as would afford a valuable consideration for the compromise declared upon, and which the evidence failed to establish.

5. **Compromise and Settlement; Defenses; General Issue.**—Where the proof failed to show that the controversy declared upon afforded a basis for a valuable consideration for the settlement alleged, such defense was available under the general issue.

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Action by William H. Daniel against R. J. Hughes in assumpsit. Judgment for defendant and plaintiff appeals. Affirmed.

The amended count A is as follows:

Plaintiff claims of defendant \$1,500 damages for the breach of an agreement entered into by him heretofore, to-wit, December 17, 1910, by which defendant promised in consideration of the settlement of the controversy between plaintiff and defendant to pay plaintiff \$900 thereafter, to-wit, on December 19, 1910, in

[Daniel v. Hughes.]

settlement of said controversy, and which offer plaintiff then and there accepted. Defendant breached said agreement in this, to-wit, defendant refused and failed to pay said amount.

Count B is the same as count A, except that it alleges the controversy as follows:

Plaintiff and defendant had a controversy in reference to plaintiff's claim against defendant for the sale of or the procuring of a purchaser for defendant's land by plaintiff, and plaintiff and defendant agreed to settle such controversy, defendant there agreeing to meet plaintiff in Birmingham on the Monday next following the said agreement and then and there pay plaintiff \$900 in settlement of said controversy, and plaintiff on his part then agreed to accept said sum in settlement of said controversy, and to be at said place at said time to receive said sum, his presence there on that occasion, and defendant's absence, and plaintiff's willingness, ability, and readiness to accept said sum since that time.

HARSH. HARSH & HARSH, for appellant. ARTHUR L. BROWN, and F. D. NABERS, for appellee.

ANDERSON, C. J.—Practically every question presented on this appeal was settled adversely to appellant's contention upon former appeal (187 Ala. 41, 65 South. 518), with perhaps the exception as to the plaintiff's right to recover under counts A and B, brought in the case by amendment at the last trial, and which were not considered upon the former appeal; the question being merely alluded to in a general way. These amended counts A and B, proceed upon the theory of a promise by the defendant to pay a fixed sum, in settlement of a dispute or controversy between the plaintiff and defendant, but neither of said counts aver that the defendant was due the plaintiff anything upon the matter or transaction out of which the controversy arose, or any other facts showing that the controversy was supported by a valuable consideration.

(1) While some confusion may have existed in some of our earlier cases as to what would be a sufficient consideration to support a contract based upon the settlement of a dispute or controversy between the parties thereto, it is now well settled that the existence of a mere controversy will not suffice unless based upon some consideration in the shape of something beneficial to one party or detrimental to the other.

[Daniel v. Hughes.]

(2) As touching the compromise and settlement of claims, whose validity is afterwards denied, in a late case we said: "The question in this class of cases is whether there is a consideration to uphold the release, or agreed compromise. The surrender of a mere assertion of claim, or the withdrawal of a threat to sue, when the claim is without legal merit, whether its legal validity is known or not, will not uphold a release, or agreement of compromise." "When a claim is absolutely and clearly unsustainable, at law or in equity, its compromise constitutes no sufficient legal consideration."—*Russell v. Wright*, 98 Ala. 652, 13 South. 594; *Ernst Bros. v. Hollis*, 86 Ala. 513, 6 South. 85; *Thompson v. Hudgins*, 116 Ala. 93, 22 South. 632; *Crawford v. Engram*, 157 Ala. 314, 47 South. 712; *Burleson v. Mays*, 189 Ala. 111, 66 South. 36.

(3, 4) Amended counts A and B, setting up as they do that the consideration in support of the promise to pay was the settlement of a controversy existing between the parties, and not charging that the controversy so settled had any legal merit, that is, involved any obligation between the parties, whereby the one was to be benefited or the other to suffer detriment to the extent that said controversy was based upon a valuable consideration, were subject to demurrer.—*Thompson v. Hudgins*, *supra*, and cases there cited. The trial court, however, improperly overruled the appellee's demurrer to these counts, and in determining whether or not they will support a judgment we must give them a liberal construction and resolve all reasonable inference in favor of them as stating a cause of action, and must infer that the pleader meant to charge such a controversy as would afford a valuable consideration for the compromise, and which the evidence fails to establish, and the defendant was entitled to the general charge as to these counts.

(5) It may be conceded that the claim in settlement of the controversy could have been recovered under the common counts; yet the proof failed to show that the controversy was such as to afford the basis of a valuable consideration, and this defense was available under the general issue.—*Ivy C. Co. v. Long*, 139 Ala. 535, 36 South. 722; *Shannon v. McElroy*, 3 Ala. App. 519, 57 South. 118.

The judgment of the city court is affirmed.
Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

[Walsh Mfg. Co. v. W. T. Smith Lumber Co.]

Walsh Mfg. Co. v. W. T. Smith Lumber Co.

Assumpsit.

(Decided May 18, 1916. 72 South. 73.)

1. **Damages; Liquidated; Penalty.**—Under a contract of sale for a dry kiln, a provision that a failure of the purchaser to return the apparatus within ten days after a stipulated test, if unsatisfactory, will subject him to the payment of the purchase price as liquidated damages, examined and held to impose a penalty.

2. **Sale; Contract; Jury Question.**—Under the evidence in this case it was a question for the jury whether the purchaser complied with the requirements of the contract in making tests of the dry kiln apparatus, which was purchased under warranty.

3. **Same; Instruction.**—The charges examined and held to properly state the duty of the buyer to make required tests, and to return the property, if found unsatisfactory; also as to waiver by the seller of requirements that the property be returned within a specified time if found unsatisfactory. (McClellan and Mayfield, JJ., dissent in part.)

APPEAL from Butler Circuit Court.

Heard before Hon. A. E. GAMBLE.

Assumpsit by the Walsh Manufacturing Company against the W. T. Smith Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following charges were given at defendant's request:

(3) The court instructs the jury that if they believe from the evidence that defendant made two tests of plaintiff's circulating fan strictly under the direction of plaintiff, and after each test gave written notice to plaintiff of the failure of the kiln to give the results guaranteed by plaintiff in said agreement, and that after such notice of the failure of said kiln, plaintiff either requested or consented that defendant should retain plaintiff's said apparatus for future tests, and that under said agreement defendants did retain said apparatus, plaintiff thereby waived promise of defendant to return said apparatus within 10 days, after the failure of the kiln to fulfill plaintiff's guaranty in said agreement.

(4) If the jury believe from the evidence that defendant reconstructed plaintiff's dry kiln, and installed therein plaintiff's circulating fan, and prepared for the starting test under the

[Walsh Mfg. Co. v. W. T. Smith Lumber Co.]

supervision of the mechanics furnished by plaintiff, that defendant tested said circulating fan by operating the kiln for more than 48 hours continuously for 24 hours per day, under 60 pounds pressure at the kiln, and that said kiln failed to dry one inch by 16 feet of pine lumber in 48 hours, that defendant gave written notice to plaintiff of the failure under said test to dry the lumber of said dimension in 48 hours, that plaintiff sent its agent to make necessary corrections in said kiln, that defendant after such corrections were made again tested said kiln under the same condition by operating the kiln 24 hours per day continuously for more than 48 hours under a steam pressure at the kiln of 60 pounds, and that in said test the kiln failed to dry lumber so as to fulfill the guarantee of plaintiff in the written agreement, the foundation of this suit, and that either at the request of or by consent of the plaintiff, defendant retained the material of said circulating fan for further test, they must find for defendant.

POWELL & HAMILTON, and O. A. LANE, for appellant. L. M. LANE, for appellee.

MCCLELLAN, J.—This is the second appeal in the progress of this litigation.—*Walse Mfg. Co. (plaintiff) v. W. T. Smith Lumber Co. (defendant)*, 178 Ala. 472, 59 South. 455. On that appeal the principal question considered was, whether a provision of the contract for the sale of machinery or apparatus for drying green lumber imposed, in an event or events, a penalty for a breach of provisions of the contract, or served to liquidate in advance the damages for a breach. The question was not decided, the six members of the court participating in its consideration being equally divided thereon. An opinion representing each view was filed, and appears in the report above cited. The judgment was reversed by a concurrence of the court in the result. After the reversal, the trial court accepted and gave effect in its rulings on the pleadings to the view expressed by Justice SAYRE and concurred in by Justices ANDERSON and SOMERVILLE, viz., that the contract created a penalty for its breach in an event, and did not simply liquidate the damages to attend its breach in an event, as was the view of Justices SIMPSON, MCCLELLAN, and MAYFIELD. The question is again presented.

The plaintiff had for sale a patent dry kiln apparatus for use in drying green lumber. The defendant had a plant for sawing

[Walsh Mfg. Co. v. W. T. Smith Lumber Co.]

timber into lumber. The defendant desired to buy the plaintiff's dry kiln apparatus. if, upon test, it would perform the service the seller asserted it would. In the event of satisfactory test and sale, the purchase price agreeable to the parties was \$1,750, with an addition of daily wage for a mechanic, and his expenses, to be sent to defendant's plant by the plaintiff to supervise the installation and starting test of the dry kiln. In all its material features the contract entered into by the parties is set out in the report of the former appeal.—178 Ala. 473-475, 59 South. 455. It is not necessary to republish it.

(1) Upon reconsideration by the full bench of the question stated, ANDERSON, C. J., and SAYRE, SOMERVILLE, GARDNER, and THOMAS, JJ., are of the opinion that the stipulation in the contract for "liquidated damages" effected to impose a penalty, as was the view stated in the opinion of Justice SAYRE writing in response to the former appeal; Justices MCCLELLAN and MAYFIELD adhering to their view that the opinion of Justice SIMPSON correctly stated the law upon this question. They therefore dissent. The result is that the trial court did not err in giving effect to the conclusion that the contract did not stipulate for "liquidated damages" in anticipation of a possible breach of the contract.

(2, 3) The errors assigned and urged as upon rulings on the admission of evidence, adverse to the appellant, have been carefully considered. They are without merit. The degree of steam pressure maintained during the test was, under the evidence, susceptible of proof by showing the registered steam pressure at the boilers and at the planing mill, beyond the dry kiln under trial on the steam line connecting the boilers, the dry kiln and the mill, along with the further evidence of the diminution of pressure due to friction or condensation in the conduits. There was evidence tending to show that the steam pressure required by the contract for the test was furnished by the defendant. Whether it was furnished was a question for the jury. The plaintiff was not entitled to the general affirmative instruction on any theory. There was evidence tending to show that the defendant made the tests required by the contract; that the defendant notified the plaintiff in writing of the failure of the initial trial; and that, after the opportunity for correcting was afforded plaintiff and after its agent again visited the plant, a further test, resulting in failure, was made. What agreement Williams, plaintiff's agent, and defendant made upon the occasion

[Colley v. Atlanta Brewing & Ice Co.]

of Williams' visit to the plant was a subject of controversy in the evidence.

Under the evidence no error resulted from the giving, at defendant's request, of special instructions numbered 3 and 4.

The judgment is not affected with error. It must be affirmed. Affirmed.

ANDERSON, C. J., and SAYRE, SOMERVILLE, GARDNER, and THOMAS, JJ., concur. MCCLELLAN and MAYFIELD, JJ., concur except as indicated in this opinion.

Colley v. Atlanta Brewing & Ice Co.

Assumpsit.

(Decided May 18, 1916. 72 South. 45.)

1. **Costs; Security for; Non Resident; Discretion.**—The matter of the time allowed a non resident plaintiff to give security for costs as required by § 3687, et seq., Code 1907, is largely within the discretion of the trial court, and the action of the court in permitting such security to be given "within the time directed by the court" is not an abuse thereof.

2. **Pleading; Filing; Time; Discretion.**—The matter of allowing special pleas to be filed more than two months after the action was commenced, and after the time fixed by the statute was within the discretion of the trial court.

3. **Appeal and Error; Harmless Error; Security for Costs.**—Any error in allowing a non resident plaintiff to give security for costs after a filing of the complaint, if error, was without injury, where there was no dispute that defendant owed the amount claimed, and the only dispute was as to credits on which issue of the case was tried.

4. **Same; Review; Finding.**—In cases tried by the court without a jury on testimony ore tenus, the rule is not to reverse a finding unless it is so manifestly against the evidence that a judge at nisi prius would set aside the verdict of the jury rendered on the same testimony; such finding must on appeal be given the force and effect of a verdict, and unless plainly wrong cannot be disturbed, notwithstanding the statute requires the reviewing court to review such judgment and finding without any presumption in favor of the court below on the evidence.

5. **Evidence; Facts or Conclusions; Agency.**—A witness can give his opinion only in exceptional cases, and then only when he has knowledge to qualify him to some extent as an expert; hence, in an action for the price of a carload of beer, the opinion or conclusion of the defendant, that a certain person was the agent of the plaintiff, was properly excluded.

[Colley v. Atlanta Brewing & Ice Co.]

6. **Principal and Agent; Evidence.**—Where defendant sought to prove that a certain person was the agent of plaintiff in the matter of the sale of the beer, the letters and bills of sale between plaintiff and such party, or the company which he represented, were admissible on the question of agency.

7. **Trial; Reception of Evidence; Objectionable in Part.**—Where the objection went to the whole testimony, a portion of which was competent, the objection was properly overruled.

APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

Assumpsit by the Atlanta Brewing & Ice Company against John Colley. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from the Court of Appeals.

PINKNEY SCOTT, for appellant. SAMUEL B. STERN, for appellee.

MAYFIELD, J.—This action was on the common counts, claiming \$400, the price of a car of beer. One count declared on a sworn account, as authorized by section 3970 of the Code. The plaintiff was a non-resident, and failed to give security for costs at the time, or before the filing of the complaint, as is provided for by section 3687 et seq. of the Code. The defendant made motion to require security for costs, which was subsequently given "within the time directed by the court." The action was commenced on December 10, 1914; the motion to require security for costs was filed December 14, 1914, but no pleas were filed until February 24, 1915, when defendant filed pleas of the general issue, payment, and set-off, and one verified plea denying the account sued upon, but only on information and belief. This special plea was not filed within the time allowed by the statutes applicable to the city court of Bessemer, in which the action was brought and was pending. On motion of the plaintiff this plea was stricken, for the reason that it was not filed within the time for special pleading.

The defendant attempted to file a replication to the motion to strike, replying that the plea was not filed within time because the plaintiff had failed to give security for costs until the day preceding the trial. The court held the replication not a good answer to the motion; and the trial was had, by the court without a jury, on the pleas, the general issue, payment, and set-off, and resulted in a judgment for the plaintiff for \$300, with interest.

[Colley v. Atlanta Brewing & Ice Co.]

(1, 2) The matter of security for costs—that is, as to the time allowed in which to give it—and the matter of allowing special pleas like the one in question to be filed after the time fixed by the statute are largely discretionary with trial courts, and we see no abuse of the discretion in this instance.—*Ex parte Jones*, 83 Ala. 587, 3 South. 811; 7 Mayfield Dig. p. 699.

(3) If there could have been error it was without injury, because there was no dispute that defendant once owed the amount claimed; the only dispute was whether or not defendant was entitled to credit for empty bottles shipped back by defendant to plaintiff, and for some freight and other charges, and upon the issue of defendant's right to such credits the case was tried.

In the main, if not wholly, the trial court found the issues in favor of plaintiff; and we are not prepared to say that the judgment was induced or reached on account of any error of law or of fact, as the case was tried by the court without a jury.

(4) In cases where the law authorizes disputed questions to be tried, by the court without a jury, on testimony given viva voce in the presence of the court, the long-established rule of this court is not to reverse the finding, unless it is so manifestly against the evidence that a judge at nisi prius would set aside the verdict of a jury rendered on the same testimony.—*Nooe's Ex'r v. Garner*, 70 Ala. 443, and authorities there cited; *Fulton v. Norris*, 162 Ala. 104, 49 South. 1028; 7 Mayf. Dig. 27. The conclusion of a court sitting without a jury, if based upon the oral testimony of witnesses, must on appeal be given the force and effect of a verdict of a jury, and, unless plainly wrong, cannot be disturbed, though a statute requires the appellate court to review the judgment and finding without any presumption in favor of the court below on the evidence.—*Stephenson Case*, 10 Ala. App. 432, 65 South. 314; Mayf. Dig. 27, 28.

(5) There was no error in declining to allow defendant to state his opinion or conclusion, that Gerson was the agent of plaintiff. He should have testified to the facts which tended to show agency, if such there were, and have let the jury draw the conclusion. It is elementary that a witness can give his opinion only in exceptional cases, and then only when his knowledge is such as to qualify him, to some extent, as an expert. The rule is well stated in *Best on Evidence*, where the author says: "This rule is necessary to prevent the other rules of evidence being practically nullified. If the opinions thus offered are founded on

[Doran & Co. v. Gilreath.]

no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury."—2 Best, Ev. 511, 517, and notes; 7 Mayf. Dig. 318.

(6) The defendant having sought to prove that Gerson was plaintiff's agent, in the matter of the sale of the beer in question, the letters and bills of sale between plaintiff and Gerson, or the company, the Four Oaks Distillery Company, which he did represent, were admissible on the subject of agency.

(7) There was no error in declining to exclude all the testimony of the witness Jacobi; much of it was certainly admissible, and the objection went to the whole, and we do not say that there was error in admitting any of it.

As before stated, this case was tried by the court without a jury, and the judge of course had to see the documents offered in evidence, before he could say whether they were admissible or not; and he had to hear, or to be informed as to the oral evidence offered, before he could decide whether or not it was competent. To this extent a trial of the facts by the court without a jury is necessarily different from that where the court passes upon the competency or relevancy only, and the jury passes upon the weight and sufficiency of the evidence.

All the errors assigned have been examined. We conclude that no reversible error was shown, and that the evidence was ample to support the judgment.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Doran & Co. v. Gilreath.

Assumpsit.

(Decided May 11, 1916. 72 South. 94.)

1. **Damages; Breach of Contract; Measure.**—Where plaintiff was prevented from performing his contract to transport certain lumber because of defendant's breach of collateral agreements, plaintiff may recover the difference between the agreed price and the reasonable cost of the performance.

2. **Shipping; Contract; Duty.**—Where plaintiff was to transport lumber by barge, and was to leave the barge with defendant to be loaded, it was

[Doran & Co. v. Gilreath.]

plaintiff's duty by implication to furnish a barge which could be kept afloat by ordinary care to be exercised by the defendant.

3. **Same; Loss of Barge; Damages.**—Where plaintiff furnished defendant a barge to transport lumber and defendant, through breach of agreement, permitted the barge to sink, plaintiff may recover not only the difference between the value of the barge before and after its sinking, but also his loss on his contract of affreightment.

4. **Principal and Agent; Agency; Estoppel.**—Where one has reasonably and in good faith been led to believe from the appearance of an authority which a principal permitted his agent to exercise that a certain agency exists, and in good faith acts on such belief, the principal is estopped from denying such agency.

5. **Same; Evidence.**—The evidence examined and held insufficient to warrant the inference of an agency, on whose purported acts plaintiff relied, and whose authority it was claimed, defendant was estopped from denying.

APPEAL from Jackson Circuit Court.

Heard before Hon. W. W. HARALSON.

Assumpsit by H. F. Gilreath against Doran & Company. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Transferred from Court of Appeals.

JOHN B. TALLEY, for appellant. BOULDIN & WIMBERLY, for appellee.

SAYRE, J.—(1) Plaintiff (appellee) could not recover the agreed price for transporting defendants' lumber from Island Creek to Bridgeport, via the Tennessee river, for, confessedly, he did not perform his part of the contract. If he was prevented by defendants' breach of certain alleged collateral engagements, express or implied, he could recover as for a breach of the main contract, so to speak, of the contract of affreightment as a matter apart from its incidental features, only the difference between the agreed price and the reasonable cost of performance.

(2, 3) Plaintiff left the barge with defendants to be loaded. It was his duty, necessarily implied, to furnish a barge that could be kept afloat by the ordinary care which, by like implication, the defendants were bound to give it. But it was battered and leaky, as defendants knew, and there may have been an understanding that defendants were to handle it in a particular way. While in the keeping of defendants, the barge sank because too much water leaked through its sides or bottom. Assuming then, that Duffey was defendants' general manager, as unquestionably

[Doran & Co. v. Gilreath.]

he was, and considering the issues raised by the conflicting tendencies of the evidence, and the several items of damage claimed by plaintiff, the case may be stated as follows: If defendants contributed to the sinking of the barge, and it would not have happened otherwise, by breaching their implied duty to exercise reasonable care in putting the lumber aboard by failing to perform their alleged promise not to keep the barge in the clear water of the creek beyond a stipulated time, or by failing to perform an agreement to employ a sufficient number of hands to keep the barge afloat by bailing out the water, this last-mentioned agreement alleged to have been made by Parden after the danger of its sinking became apparent and pressing, and as an alternative to its immediate removal by plaintiff, then, in either of these events, plaintiff was entitled to recover the difference, broadly speaking, between the value of the barge on the surface and its value at the bottom of the creek, plus the profit he would have made by transporting the lumber according to contract. Whether plaintiff was entitled to recover the value of his labor in pumping the water out of the barge before it sank depended, as matter of law, upon whether Duffey should be held to have intended to request it in order to repair the consequences of wrong on his part or merely to have suggested it for the mutual benefit and convenience of the parties; this in turn depending as a matter of fact upon whether the barge leaked ominously because not properly handled or by sole reason of its own deficiencies. Whether defendants were liable for the value of plaintiff's labor in the effort to raise the barge after it sank depended upon like findings, and this, in addition, that Parden had apparent authority to act for defendants in the premises. So, too, defendants' responsibility for keeping the barge in clear water overtime, if that caused it to sink, depended upon Parden's apparent authority to act for defendants in that matter.

(4, 5) That Parden had no real authority is not disputed. Plaintiff sought to impute an agency to him by estoppel. "The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that, where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency, to the prejudice of the one so dealing."—*Columbia Mill Co. v. National Bank of Commerce*, 52

[Doran & Co. v. Gilreath.]

Minn. 224, 53 N. W. 1061, quoted in 31 Cyc. 1219, note. This is substantially the rule stated in *Patterson v. Neal*, 135 Ala. 477, 33 South. 39. It is frequently a matter of difficulty to determine upon general principle whether an agency should be implied from appearances, and in such cases the question should be left with the jury under proper instructions. But the following rules are laid down as proper to be observed: "It [agency] will not be inferred from the fact that third persons thought the agency existed, nor because the alleged agent assumed to act as such, nor because the conditions and circumstances were such as to make such an agency seem natural and probable, and to the advantage of the supposed principal. Finally, an implied agency must be based upon facts, and facts for which the principal is responsible, and upon a natural and reasonable, and not a strained, construction of those facts. And if, in view of the facts, an implied agency is apparent, its extent is limited to acts of a like kind with those from which it is implied, and is to be restricted to the purpose for which the facts show it was granted."—31 Cyc. 1218.

The doctrine of agency by estoppel, for peculiar reasons referred to in *Syndicate Insurance Co. v. Catchings*, 104 Ala. 176, 16 South. 46, and that line of cases, cited by appellee, has been applied most liberally in favor of policy holders in cases where they dealt with insurance companies. Still, it has been uniformly held that the party who would avail himself of the benefit of the doctrine must have dealt in good faith and without negligence with an agent acting within the usual scope of the business intrusted to agents of the kind.—*Ray v. Fidelity-Phoenix Fire Ins. Co.*, 187 Ala. 91, 65 South. 536.

In the record before us we find no sufficient reason upon which it might have been found that plaintiff was justified in entertaining the belief that Parden had authority on behalf of defendants to make the agreements on account of which plaintiff sought to charge defendants for Parden's failure to get hands enough to bail out the barge or the value of his own efforts to raise it after it had sunk. On the contrary, the circumstances pointed away from, rather than to, the inference that Parden had authority in respect to those matters. Duffey was defendants' general manager, as plaintiff knew, and he had made the contract with plaintiff and was actively engaged in superintending its execution. Parden was employed by Duffey, and in Duffey's temporary absence from the places where Parden was at

[Doran & Co. v. Gilreath.]

work, the latter may have managed in a way; but he was not shown to have exercised anything like a general direction of defendants' business. It did not appear that he had ever made any contracts for defendants. In the transaction in question he was told to take other employees and load the barge. It may be that "he was supposed to take care of it;" but from no circumstance in evidence did plaintiff have reason to believe that he had authority to change the conditions of the contract that plaintiff had negotiated with Duffey, certainly not so while Duffey was aware of the emergency that had arisen and, though not on the spot at the moment, was giving it his personal attention. Nor did any reasonable interpretation of the evidence in any aspect warrant the notion that Parden had authority to make a contract with plaintiff to raise the barge at defendants' expense, and bind defendants by the implications of such contract. The situation then and Parden's method of dealing with it, if he agreed as alleged, must have appeared to plaintiff to be very unusual. These acts do not appear to have been within the apparent scope of the business generally intrusted to employees such as he was. There was no indication that Parden had authority to make any contracts whatever except that, according to plaintiff's contention, he did assume to make for defendants the agreement in question, the one in the teeth of the contract plaintiff claimed to have made with Duffey, the other a contract to meet what must have been an extraordinary situation. On the evidence, Parden had no such authority as plaintiff attributed to him, and the question should have been taken away from the jury on defendants' request in writing.

The charges given for plaintiff involved misleading tendencies, to say no more, because they ignored, or failed sufficiently to state, some of the issues on which, under the evidence, defendants' liability depended. There was error in refusing some of defendants' charges, since some of them correctly stated in effect that Parden was not the agent of defendants for the special purposes to which we have referred.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

[Cole Motor Car Co. v. Tebault.]

Cole Motor Car Co. v. Tebault.

Assumpsit.

(Decided June 1, 1916. 72 South. 21.)

1. **Custom and Usage; Application; Knowledge of Parties.**—A prevailing usage of trade, however general, cannot be presumed to have been in the contemplation of the parties so as to control or vary the ordinary legal implication of their agreement unless it is actually known to them, or has prevailed for so long a time that their knowledge of it may be reasonably presumed.

2. **Same; Evidence.**—Itemized statements submitted to plaintiff by defendant containing no suggestion of a custom, there being no evidence that the usage relied on by defendant was existent prior to the date of the contract, plaintiff having testified to a diametrically opposite custom, was insufficient to warrant submission to the jury of the existence of such a custom or usage relied on by defendant.

3. **Charge of Court; Effect of Evidence.**—Where the action was assumpsit for commissions on automobiles sold by plaintiff, and defendants relied on a custom or usage of trade, but there was no proof of such customs or that plaintiff had knowledge thereof, its oral charge that the jury were to have regard only to the contract itself, was not improper as a charge on the effect of evidence under § 5362, Code 1907.

4. **Principal and Agent; Commissions; Burden of Proof.**—Where the action was for commissions on automobiles sold, and plaintiff proved cash sales, the burden was on defendant to plead and prove payment of the items shown by plaintiff, either by showing an application thereto, by one of the parties, or by implication of law.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Assumpsit by P. D. Tebault against the Cole Motor Car Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The suit was to recover commissions alleged to be due plaintiff on sales of automobiles made by plaintiff as agent of defendant. The contract between the parties was oral, made March 1, 1914, and simply provided for payment of plaintiff by defendant of 5 per cent. on the price of all Maxwell cars sold by plaintiff; nothing being said as to how or on what terms the cars were to be sold. Plaintiff testified, however, that under the contract he was to receive his commission as soon as the car was delivered to the customer. He further testified that he could not sell the car for anything less than the list price without first submitting the

[Cole Motor Car Co. v. Tebault.]

proposition to defendant, and that, when a secondhand car was received in part payment for the car sold, he had no interest in the secondhand car, and the price at which it was sold did not affect his commission; and that it was the general custom for automobile salesmen selling on a fixed commission to receive the commission whether the sale was for cash or on credit, or whether property was taken in exchange or not. The defendant testified that the contract was substantially as stated by plaintiff, and that in figuring the amount of commission due plaintiff he based the commission upon the actual amount received for the car, and not upon the list price, and that where a secondhand car was received in part payment, or other property was received, he could not ascertain the commission until the secondhand property was sold, and a definite amount realized from it. Defendant's witnesses Black and McIntyre testified that in March, 1914, there was a definite general custom prevailing in the city of Montgomery concerning contracts between automobile dealers and salesmen, who were employed by them, as to the commission to be paid for the sale where an old or secondhand car was taken in part payment of an automobile sold by such salesman; that this general custom was that the commission was to be based on what was received for the new car, including the price which was received for the secondhand car when sold, and the commission was not to be allowed until the secondhand property was sold; that the commission was figured on what was realized on the new car.

The complaint contained two common counts and two counts on the contract, the fourth count specifying each automobile sold, the price, the purchaser, and the commission agreed on. In its oral charge to the jury the court instructed them that, as there was nothing to show how long the several customs testified to had existed in the city of Montgomery, and hence no inference that it entered into the contract, the question for their determination was: What was the contract between the parties? The defendant requested in writing an instruction that plaintiff was not entitled to recover under the fourth count, which instruction was refused.

BLAKEY & STRASBURGER, and WM. F. THETFORD, for appellant. WARREN S. REESE, for appellant.

[Cole Motor Car Co. v. Tebault.]

SOMERVILLE, J.—The only questions presented by the assignments of error are upon defendant's exception to a portion of the oral charge to the jury, and the refusal of the affirmative charge for defendant as to the fourth count of the complaint.

(1) A prevailing usage of trade, however general, cannot be presumed to have been in the contemplation of contracting parties so as to control or vary the ordinary legal implications of their agreement, unless it is actually known to them, or unless it has prevailed so long, that their knowledge of it may be reasonably presumed.—*Byrd v. Beall*, 150 Ala. 122, 43 South. 749, 124 Am. St. Rep. 60; *C. A. Ins. Co. v. C. F. Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291; *Haas v. Hudmon*, 83 Ala. 174, 3 South. 302; *Stoudenmire v. Harper*, 81 Ala. 242, 1 South. 857; *E. T., etc., R. R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489.

(2) In the present case there is nothing in the evidence that has any tendency to show that plaintiff had any knowledge of the custom relied on by defendant.

It is clear that the itemized statement submitted by defendant to plaintiff, which contained only the names of purchasers and the amount of commission figured by defendant, contained no suggestion of such a custom, and exhibited no more than defendant's own claim in the matter. Nor did plaintiff's testimony that there was a custom in the automobile business diametrically opposed to the custom relied on by defendant, in any way tend to show any knowledge by him of the latter custom, but quite the contrary.

So, also, the theory of implied knowledge of the custom—or, more properly, usage—entirely fails because it does not appear that the usage was existent at all prior to the date of the contract, and there is no basis for any inference of fact by the jury that plaintiff had knowledge of it at that time.—*Stoudenmire v. Harper*, 81 Ala. 242, 246, 1 South. 857.

(3) There was therefore no question to submit to the jury as to the existence and effect of usage, and they were properly instructed to have regard only to the contract itself. This was not a charge on the effect of the evidence, but rather that there was no evidence, and its giving ex mero motu was clearly not inhibited by section 5362 of the Code.—*Thomas v. State*, 150 Ala. 31, 43 South. 371.

The theory upon which defendant's refused charge was requested was that, since at least \$415 had been paid by defendant

[Capital Security Co. v. Owen.]

to plaintiff on account of these sales, and this amount was sufficient to cover all commissions on cash sales, and since plaintiff could only recover on the fourth count for cash sales, and there was nothing to show that these payments were not applied to such sales, therefore plaintiff failed to show that anything was now due on the cash sales declared on in that count.

(4) This theory overlooks and misplaces the burden of proof with respect to payment. Plaintiff's case was fully made out when he proved cash sales. If the items proved had been paid, in whole or in part, the burden was on defendant to plead and prove it, either by showing an application thereto by one of the parties, or by implication of law.—*Nelson v. Larmer*, 95 Ala. 300, 11 South. 294; *Kent v. Marks*, 101 Ala. 350, 14 South. 472; *Connor v. Armstrong*, 91 Ala. 265, 9 South. 816. But there is nothing in the bill of exceptions to show any application to particular items by either expression or implication. The charge was therefore properly refused.

Finding no error in the record, the judgment will be affirmed. Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Capital Security Co. v. Owen.

Assumpsit.

(Decided May 18, 1916. 72 South. 8.)

1. **Appeal and Error; Review; Exception.**—On appeal the bill of exceptions must affirmatively show that exceptions to a part of the oral charge were taken pending the trial and before the jury retired.

2. **Same; Presumptions.**—All presumptions are that the trial court committed no error.

3. **Same; Showing Error.**—Where the record showed that after an exception had been taken to a part of the court's oral charge, the court concluded its oral charge, it affirmatively appears that the exception was taken pending the trial, and before the jury retired.

4. **Principal and Agent; Liability to Third Person; Ratification.**—Where an agent sells chattels and makes guarantees, agreements, or representations as part of the contract of sale, or inducement thereto, and the principal brings suit thereon against the purchaser, the principal is bound by such guarantee, agreements, or representations.

[Capital Security Co. v. Owen.]

5. **Same; Agency; Proof.**—The burden of proving agency rests upon the party affirming it.

6. **Building and Loan Association; Subscription; Contract.**—Where the purchaser of a building and loan contract sues to recover premiums paid, based on fraud or misrepresentation, and such purchaser had signed a contract stating his understanding that the company was not bound by any misrepresentation made by its agents, the purchaser was bound by its terms unless he was prevented from reading the contract by the fraudulent representations of the seller, or of the seller's agent.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Assumpsit by George F. Owen against the Capital Security Company. Judgment for plaintiff, and defendant appeals. (Transferred from the Court of Appeals under section 6, p. 449, Act April 18, 1911.) Reversed and remanded.

The contract was what is known as the Home Purchasing Investment Contract, and contained the following: "I make this application expressly and solely upon the terms and condition of said contract, and the option, provisions, and requirements set forth on the back and made a part thereof, and not on the faith of any statement, promise, or undertaking or guaranty on the part of the assignor or any other person. I understand that no agent of the Capital Security Company, nor any other person, is acting as the agent for the Capital Security Company in the sale of this contract to me. I understand that the Capital Security Company is not bound by any representation, promise, or statement of any person whatever, altering, changing, or modifying the contract in any particular."

The suit was for premiums paid and based on the fraud and misrepresentations of the agent selling the contract.

EDWARD S. WATTS, and R. H. & R. M. SMITH, for appellant.
BOYLES & KOHN, for appellee.

THOMAS, J.—The plaintiff's cause was tried in the law and equity court upon the common count for money had and received. The defendant pleaded, in short by consent: (1) the general issue; (2) estoppel; and (3) waiver of the fraud.

To the refusal of the court to give charges requested in writing by the defendant, as well as to the giving of the portion of the general charge excepted to, error is assigned.

The appellee insists that by the act of September 25, 1915, charges in writing moved for by either party become a part of

[Capital Security Co. v. Owen.]

the record, and must be presented for review as a part of the record, and not by bill of exceptions. The proper construction of this act under the adjudicated cases (*Petty v. Dill*, 53 Ala. 641; *Conway v. Clark*, 171 Ala. 391, 55 South. 117; *Diggs v. State*, 77 Ala. 68; *Irby v. Kaigler*, 6 Ala. App. 91, 60 South. 418) is not now presented. The trial was had, the bill of exceptions presented to and signed by the trial judge, and the appeal perfected, before the passage of the act.—Gen. Acts 1915, p. 815.

(1-3) The bill of exceptions must affirmatively show that exception to a part of the oral charge was taken pending the trial, and before the jury retired. All the presumptions are that the trial court committed no error.—*City of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Reynolds v. State*, 68 Ala. 502; *Moore v. State*, 146 Ala. 687, 40 South. 345; *Meadows v. State*, 182 Ala. 66, 62 South. 737, Ann. Cas. 1915D, 663. We are of the opinion that the record affirmatively shows that the exception to the part of the oral charge was taken pending the trial and before the jury retired. After the exception was taken, the court concluded the oral charge.

When the part of the charge excepted to is considered with the whole of the oral charge, it is obvious that no error was committed by the trial court in the oral charge.—*Williams v. State*, 83 Ala. 68, 3 South. 743; *Decatur Co. v. Mehaffey*, 128 Ala. 242, 29 South. 646; *Reeves v. State*, 13 Ala. App. 1, 68 South. 569.

(4) It has long been the law where the agent, in selling chattels for the vendor, makes guaranties, agreements, or representations as a part of the contract of sale, or inducement thereto, and suit is brought by the vendor against the vendee, the latter is bound by the guaranties, agreements, or representations of the agent.—*Philips & Buttorff Mfg. Co. v. Wild Bros.*, 144 Ala. 545, 39 South. 359; *Gilliland v. Dunn & Co.*, 136 Ala. 327, 34 South. 25; *Holman v. Calhoun*, 146 Ala. 690, 40 South. 356; *Williamson v. Tyson*, 105 Ala. 644, 17 South. 336; *Atwood v. Wright*, 29 Ala. 346.

The *Philips & Buttorff Mfg. Co. Case* is cited in 31 Cyc. 1259, with many authorities, to the effect that the principal cannot ratify a contract made for him by an agent, without also ratifying and becoming bound by the terms and conditions, although unauthorized, upon which it was made, nor ratify, without ratifying the representations and warranties, and all other instrumentalities employed by the agent as an inducement to effectuate or bring about the contract.—31 Cyc. 1259.

[Capital Security Co. v. Owen.]

(5) The burden of proving the agency rests upon the party affirming its existence.—*Ebersole v. So. B. & L. Ass'n*, 147 Ala. 177, 41 South. 150; *George v. Ross*, 128 Ala. 666, 29 South. 651; *Sellers v. Com. Fire Ins. Co.*, 105 Ala. 282, 16 South. 798; *Spratt v. Wilson*, 94 Ala. 608, 10 South. 209. So, of one who would relieve himself from personal liability on the ground of agency.—*Gillaspie v. Wesson*, 7 Port. 454, 31 Am. Dec. 715. And it also applies to one who would charge another as principal with the act of an alleged agent.—*Ebersole v. So. B. & L. Ass'n*, *supra*; *Philips & Buttorff Mfg. Co. v. Wild*, *supra*; *George v. Ross*, *supra*; *Spratt v. Wilson*, *supra*.

In *Fulton v. Sword Medicine Co.*, 145 Ala. 331, 40 South. 393, where the suit was based upon a written order, signed by the defendant, addressed to the plaintiff, by which the defendant ordered certain goods at specified prices, and wherein it was stated that "none of the medicine shall be returned for credit," and "I, or either of us, accept this order on terms stated above. There is no verbal agreement aside from this order, of which I have a duplicate," the court said: "The order signed by defendant, when accepted by the plaintiff, constituted a contract, which the parties had reduced to writing, and the defendant could not contradict the same by parol testimony. While it is true that, where goods are sold by an agent, the general rule is that, if the principal 'seeks to avail himself of the benefits of the contract made by his agent, he is bound by the representations made by the agent.'—*Gilliland v. Dunn*, 136 Ala. 327, 34 South. 25; *Williamson v. Tyson*, 105 Ala. 644, 17 South. 336. Yet this does not contravene other recognized principles of law. 'The doctrine of apparent authority can be invoked only by one who has been misled to his detriment by the apparent authority of the agent.'—*Patterson v. Neal*, 135 Ala. 482, 33 South. 39. And when a traveling salesman sells goods to a customer and the customer signs a written order to the principal, stating distinctly, as in this case, that 'none of the goods shall be returned for credit,' and that 'there is no verbal agreement aside from this order,' it shows notice to him that the agent has no authority to make any verbal agreements varying the terms of the written contract; and, if he agrees with the agent that the agent is to inform the principal that he is not to ship the goods unless he agrees to contradictory terms, the principal is not bound thereby, unless the agent informs him before the goods are shipped."

[McLeod v. Garrish.]

This case is followed in *Green & Sons v. Lineville Drug Co.*, 167 Ala. 372, 52 South. 433.

(6) If the appellee signed a writing that embraced the terms of the home investment certificates in the appellant company, he was bound by its terms, unless he was prevented from reading it by the fraudulent misrepresentation of the seller or the seller's agent.—*Woody v. Matthews*, 194 Ala. 390, 69 South. 607; *Prestwood v. Carleton*, 162 Ala. 334, 50 South. 254; *B. R., L. & P. Co. v. Jordan*, 170 Ala. 536, 54 South. 280; *Leonard v. Roebuck*, 152 Ala. 315, 44 South. 390.

It is unnecessary to discuss the evidence in this case. It is sufficient to say that after its careful consideration we are of the opinion that the evidence does not bring the case within the influence of *Sou. Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 South. 737, but that it is governed by the recent decision of this court in *Capital Security Co. v. Gilmer*, 190 Ala. 340, 67 South. 258.

The defendant was entitled under the evidence to the affirmative charge; and for the refusal of the court to give such written charge at the request of the defendant the judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

McLeod v. Garrish.

Assumpsit.

(Decided May 18, 1916. 72 South. 72.)

1. **Bill of Exceptions; Authenticity.**—Where the trial judge had died pending the signing of a bill of exceptions, and no motion was made in this court to establish such bill, rulings on the trial properly shown by bill of exceptions cannot be considered on appeal, and written agreement of counsel cannot be taken and considered as bill of exceptions.

2. **Same; Establishment.**—On proper motion in the appellate court written agreement of counsel in this case would have been sufficient evidence upon which to establish bill of exceptions, as provided by the statute.

3. **Appeal and Error; Judgment to Support; Transcript.**—The failure of the transcript to show a legal judgment, as the basis for the appeal sought to be taken must result in the dismissal of such appeal.

[McLeod v. Garrick.]

4. *Same*.—The judgment appealed from can be presented to this court only by a certified transcript of the record of the trial court, and a bill of exceptions cannot be looked to for the judgment.

APPEAL from Clarke Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

P. L. McLeod had judgment against one N. J. Bradford, and had execution thereon with levy upon certain property. M. S. Garrick interposed claim to same, and on the trial of the right of property claimant prevailed, and plaintiff in execution appeals. Transferred from the Court of Appeals under Acts 1911, p. 450, § 6. Appeal dismissed.

The record consists of matters and things which happened at the trial, but is not signed by the judge trying the cause; he having died pending the appeal. At the end of the transcript the following appears: "In the above-entitled cause it is hereby agreed by and between Q. W. Tucker, as attorney for plaintiff, and T. J. Bedsole, as attorney for defendant and claimant, that the foregoing abstract of the record in said cause, together with the pleadings, exhibits and securities for court costs, which was tried at the fall term, 1914, of the circuit court of Clarke county, Ala., before Hon. John T. Lackland, judge of the First judicial circuit of Alabama, who has died since the trial of said cause, shall be substituted in lieu of the transcript required by law in appeals, and that said cause shall be held and determined by the Court of Appeals of Alabama, upon such abstract, the same to be considered and treated in all respects as if the bill of exceptions had been duly and legally established in said court, signed in duplicate by the attorneys mentioned above, and filed with the clerk of the court."

No judgment appears in the record proper, but the judgment, if any appears, is in the transcript and sought to be covered by the agreement above set out. Order submitted on motion to dismiss the appeal, and, if overruled, on the merits.

Q. W. TUCKER, for appellant. T. J. BEDSOLE, for appellee.

THOMAS, J.—(1, 2) No bill of exceptions was signed by the presiding judge, or established as provided by the statute. Rulings on the trial, required to be presented by bill of exceptions, cannot be considered by this court unless so presented. The written agreement of counsel in this cause is not a bill of excep-

[Brown v. Moon.]

tions. Such agreement, on proper motion in the appellate court, would have been sufficient evidence to establish the bill of exceptions.—*Graves, et al. v. State*, 178 Ala. 1, 59 South. 584; *Cook v. Phonoharp Co.*, 163 Ala. 517, 50 South. 1021.

(3) The transcript fails to show a legal judgment as the basis for the appeal sought to be taken, and dismissal of the appeal must follow on this ground.—*Gunter v. Mason*, 125 Ala. 644, 27 South. 843; *C. of Ga. Ry. Co. v. Coursen*, 8 Ala. App. 589, 62 South. 977.

(4) The judgment appealed from can be presented to the appellate court only by certified transcript of the record of the trial court, and the bill of exceptions cannot be looked to for the judgment.—*Conway v. Clark, et al.*, 171 Ala. 391, 55 South. 117; *Borom, et al. v. Posey, et al.*, 133 Ala. 666, 31 South. 1035; *Street v. Frank*, 136 Ala. 616, 33 South. 879; *Gaston v. Marengo Imp. Co.*, 139 Ala. 465, 36 South. 738; *Lay v. Postal Tel. Co.*, 171 Ala. 172, 54 South. 529.

The motion is granted, and the appeal is dismissed.

Appeal dismissed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Brown v. Moon.

Assumpsit.

(Decided June 1, 1916. 72 South. 29.)

1. **Witnesses; Impeachment; Character.**—In impeaching a witness for bad character, the proper inquiry is as to the general character of the witness sought to be impeached, and it need not be limited to truth and veracity.

2. **Appeal and Error; Harmless Error; Evidence.**—Any error in sustaining plaintiff's objection to defendant's question to a witness as to plaintiff's general character, instead of his character for truth and veracity, plaintiff having testified as a witness, was rendered harmless, where the witness subsequently testified that he did not know plaintiff's reputation, and had not heard it discussed, and that all he knew about it was through personal transactions with plaintiff; reputation being that which people generally in a community say and think of a person, and individual acts and opinions not being material.

APPEAL from Jefferson Circuit Court.
Heard before Hon. E. C. Crow.

[Brown v. Moon.]

Assumpsit by William Moon against A. M. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

The first assignment of error is that the court erred in not allowing the witness Martin to answer the question of defendant: "Do you know the general reputation of plaintiff in the community in which he lives?"

MCENIRY & MCENIRY, for appellant. GOODWYN & ROSS, for appellee.

ANDERSON, C. J.—(1, 2) In impeaching a witness upon bad character, the proper inquiry is the general character of the witness sought to be impeached, and the inquiry need not be confined to truth and veracity.—*Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Ward v. State*, 28 Ala. 53; *Kilgore v. State*, 124 Ala. 24, 27 South. 4. The trial court therefore erred in sustaining the objection to the defendant's question to the witness Martin as to the plaintiff's general character, instead of character for truth and veracity, he having testified as a witness; but we think this was error without injury, as the said Martin subsequently testified that he not only did not know the plaintiff's character for truth and veracity, but that he had not heard the plaintiff's reputation and character discussed, and that all he knew about it was his personal transaction with him. "Reputation" is what people generally in a community say and think of a person, and individual acts or opinions are immaterial.—*Way v. State*, 155 Ala. 52, 46 South. 273; *Andrews v. State*, 159 Ala. 14, 48 South. 858; *So. R. R. Co. v. Hobbs*, 151 Ala. 335, 43 South. 844. It is manifest that the witness Martin would have answered the defendant's question in the negative had the court not improperly sustained the objection to same.

The judgment of the circuit court is affirmed.
Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

[First National Bank v. Henderson.]

First National Bank v. Henderson.

Assumpsit.

(Decided May 11, 1916. 72 South. 91.)

Contracts; Construction; Intent.—The contract stated and examined and it is held that since the intent of the parties governed, defendant was not bound by that portion of the contract placing particular obligations on the corporation, subsequent references to the parties of the second part showing that defendant was not included.

Action by the First National Bank of Gadsden against Hugh C. Henderson for breach of contract. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the agreement referred to in the opinion:

This agreement by and between the First National Bank of Gadsden, R. V. Davidson, S. McGaughy, Eva G. McGaughy, and J. L. Dorsey, parties of the second part, witnesseth:

(1) For the consideration hereinafter named, the parties of the first part do hereby collectively and severally release and discharge the parties of the second part collectively and severally from any and all liability which either or all of the parties of the second part may be under to either or all of the parties of the first part for and on account of all matters relating to, connected with or growing out of the affairs of the Alabama Harness Company, and particularly for and on account for any and all indebtedness claimed by the parties of the first part, either or all of them against the Alabama Harness Company, and parties of the first part, do further obligate themselves to assign and transfer without recourse to said Henderson twelve thousand five hundred dollars of the capital stock of the Alabama Harness Company, being all the capital stock of the said company owned or held or controlled by the parties of the first part, or either of them, and parties of the first part, do hereby obligate themselves to pay all fees and expenses of attorneys representing at any time the petitioning creditors, or parties of the first part or either of them in any and all matters of litigation or dispute now or lately pending or existing between parties of the first part and parties of the second part or any of them, and parties of the first part agree not to throw any obstacles in the way of the reorganization of the Alabama Harness Company, and the resumption of business

[First National Bank v. Henderson.]

by it, but will aid by their good offices such reorganization and resumption in all ways that they reasonably can.

(2) That in consideration of the foregoing the Alabama Harness Company agrees to pay the First National Bank of Gadsden twenty-six thousand dollars as follows: First, to pay over to the First National Bank of Gadsden the entire amount of the "special fund" now in the hands of the receiver and kept separately as required by the order of the United States court, said fund now amounting to about sixty-two hundred dollars. Second, to assign and transfer to said bank without recourse all the old accounts (not including claims against persons declared bankrupts) due to the Alabama Harness Company, and contracted prior to the filing of the petition in bankruptcy at the valuation of fifty cents of the amount due thereon, said accounts to be just and unpaid. Third, to assign and transfer to said bank without recourse all unpaid accounts owing to the receiver or receivers of the said Alabama Harness Company at one hundred per centum of the amount due thereon, said accounts to be just and unpaid. Fourth, the remainder of said twenty-six thousand dollars with 4 per cent. of said remainder added thereto is to be paid by the sale and delivery by said harness company to said bank of goods of said harness company now in stock at wholesale prices, to be selected by the First National Bank or its agent. If any of said accounts prove to be unjust or to have been paid the Alabama Harness Company will make good either in money or account or goods, such deficiency to be made good at the same price at which said accounts were taken. If said harness company elects to make good such deficiency in accounts or goods, the bank has the right to select such goods or accounts from all those belonging to said harness company, at one hundred cents on the dollar for accounts, or at wholesale prices for the goods.

(3) Parties of the second part agree to dismiss the petition for review of the Alabama Harness Company matter now pending before the Circuit Court of Appeals of this circuit, and the Alabama Harness Company to pay all proper costs and expenses of the bankruptcy proceedings against it.

(4) And the parties of the second part further agree not to throw any obstacle in the way of the First National Bank of Gadsden, its agent or attorneys, nor hinder, delay nor interfere in the collecting or securing of the accounts herein mentioned and to be transferred to said bank, but by their good offices and

[First National Bank v. Henderson.]

assistance will aid said bank, its agent or attorneys, in collecting or securing said accounts in all legal, reasonable and proper methods, and will facilitate the transfer and collecting and securing of said accounts in every reasonable and proper manner.

(5) On compliance with this agreement, it is understood and agreed that the parties of the first part, or either of them, and the petitioning creditors and sureties, are hereby released and discharged from any and all damages, liability or claims of any kind for which they, any of them or either sureties may be liable by reason of the instituting of the bankruptcy proceedings against the Alabama Harness Company, or growing out of the same.

(6) It is understood and agreed that in all matters relating to this transfer of accounts, the proper assignment thereof, and whatever may be necessary to fully carry out this agreement, all such matters shall be referred to O. D. Street and A. R. Brindley, the respective attorneys for the parties hereto, and the agreement of said attorneys thereon shall be binding, and in the event said attorneys are unable to agree on any detail they shall agree on an umpire or a third party to whom the disputed matter shall be referred, and the decision of such umpire shall be binding.

JOHN A. LUSK & SON, W. C. RAYBURN, and W. G. BOYKIN, for appellant. STREET & BRADFORD, for appellee.

MCCLELLAN, J.—The appellant brought this action against the appellee to recover damages alleged to have resulted to the plaintiff because of the defendant's breach of the contract (signed by both plaintiff and defendant, with others) reproduced with the report of this appeal. The court below gave effect in its rulings to the conclusion that the defendant had made no promise, assumed no obligation upon which the breaches assigned in the complaint, original and as amended, could be predicated. Our conclusion accords with that prevailing in the trial court.

The first, second, third, and fourth counts of the original complaint assign breaches of the respective obligations expressed in the fourth subdivision of paragraph 2 of the contract. Count A of the amended complaint assigns breaches of respective obligations expressed in the second, third, and fourth subdivisions of paragraph 2 of the contract. In the amendment filed October 6, 1915, the breaches assigned are predicated of respective provisions of subdivision 4 of paragraph 2 of the contract.

[First National Bank v. Henderson.]

The fate of this appeal depends, as did the result below, upon the construction of the contract. It is the intention of the parties to the contract that must be given effect. The provisions of the second paragraph of the contract exclude the possibility of an interpretation that H. C. Henderson (defendant) made any promise or assumed any obligation to meet the stipulations upon which the breaches are laid in the original and amended complaint. The performance of the contract in those respects was alone obligatory on the Alabama Harness Company, a corporation. The second paragraph only assumes to express the promise and obligation of that corporate entity. It is true the defendant and the corporation are nominated among the "parties of the second part;" but the use of that phrase could have no effect to impose upon the defendant an obligation or obligations the instrument as a whole clearly shows to have been assumed by one only of the "parties of the second part." The phrase, as well as the one referring to the "parties of the first part," in its common use, is suggested by convenience and is descriptive merely. Usually, it serves to save the renaming of contracting parties. Whenever its descriptive effect contradicts the intent of the parties as shown by the instrument otherwise, it is not regarded as of sufficient strength to control the judicial judgment. See *Sanders v. Betts*, 7 Wend. (N. Y.) 287; *Mogk v. Peterson*, 75 Cal. 499, 500, 17 Pac. 446; *Fairchild v. Lynch*, 42 N. Y. Super. Ct. 265, 277-279. In this contract, paragraph 2 did not undertake to employ the phrase to describe the person or entity to be bound in the respects therein stipulated. On the contrary, the corporation was named as the entity bound thereby. In the third and fourth paragraphs of the contract the general designation is of the "parties of the second part;" thereby quite clearly evincing, if anything more were needed, an intent to discriminate between the Alabama Harness Company, one only of the parties of the second part, and the corporation and two others elsewhere therein described as the parties of the second part.

We can find nothing in the instrument to indicate any purpose to impose on Henderson the obligations of a guarantor or surety for the Alabama Harness Company.

Code, § 2503, cannot, of course, operate to impose obligations not assumed by the party to be bound.

The judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

[Beasley, et al. v. Burroughs & Taylor Co.]

Beasley, et al. v. Burroughs & Taylor Co.

Assumpsit.

(Decided May 18, 1916. 72 South. 122.)

1. **Fraudulent Conveyance; Reservation of Benefit; Right of Creditors.**—Under § 4287, Code 1907, a mortgage on a stock of goods to secure an existing indebtedness, as well as future indebtedness, with the parol agreement that the mortgagor should retain possession of his stock of goods, and carry on the business under his own name, and sell the goods and keep the stock insured, was such a reservation of benefit to the mortgagor, as rendered the mortgage void as against creditors of the mortgagor.

2. **Same.**—The mere fact that a mortgagor is employed by the mortgagee, before or after the execution of the mortgage, and is authorized as the agent of the mortgagee to sell the goods in the regular course of trade, would not be such a reservation of benefit to the mortgagor as to render the mortgage void under § 4287, Code 1907.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Suit by the Burroughs & Taylor Company against J. T. Beasley and another for the breach of a forthcoming bond in attachment. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under Act April 18, 1911 (Laws 1911, p. 450) § 6. Affirmed.

The attachment was issued at the instance of plaintiffs against W. C. Parish and levied upon a lot of dry goods, and the bond was given for the forthcoming of the goods if found liable to attachment as the property of W. C. Parish. It is alleged that defendants failed to make and set forth their claims in a written affidavit as required by the statute, and that judgment was rendered in the original suit in favor of plaintiffs, and against Parish, and defendants have failed to deliver the property described therein. The defendant filed the general issue and a plea setting up the ownership of the goods under mortgage covering the property in question, and that the amount secured by the mortgage was greatly in excess of the value of said stock of goods, and the other property embraced in the mortgage. The other facts sufficiently appear in the opinion.

W. O. MULKEY, for appellant. W. R. CHAPMAN, for appellee.

[Beasley, et al. v. Burroughs & Taylor Co.]

MAYFIELD, J.—This appeal involves only one question; that is, the validity of a mortgage, as against creditors of the mortgagor.

The mortgage was chiefly on a stock of goods being used in trade in a mercantile business by the mortgagor, though there was also other property embraced therein. The mortgage was executed to secure existing indebtedness, as well as debts to be incurred in the future. The instrument contained, among others the following provisions:

"It is understood and agreed by the mortgagors and J. T. Beasley that the proceeds from the sale of the said stock of goods is to be placed to the credit of said mortgage indebtedness until fully paid, with interest on same less the actual running expenses to carry on said business. We further agree to keep said stock of goods fully insured, seventy-five per cent. on the dollar."

The mortgage was dated December 14, 1907, and the law day was May 1, 1908.

It also appears without dispute that there was a parol agreement between the mortgagor and the mortgagee, as to the continuation of the business and sale of the goods mortgaged, and as to a salary to be paid the mortgagor. This parol agreement is stated by the mortgagor as follows:

"The witness remembers about the sheriff coming over to Samson in March, 1908, and at that time he was in business in a way, according to contract; he was in charge of a stock of goods just like it is on record. Witness was there in charge of a stock of goods, and was operating the business under the name of W. C. Parish; he had a sign in front of the store, and it was W. C. Parish, and there was no other name, just W. C. Parish; that he had been there nearly over a year then; that after the levy after the sheriff came there he continued to operate it there until some time in May; he operated it for six weeks later than that; and he continued to operate it in the name of W. C. Parish, and during all that time he was selling some goods, and kept offering them for sale, a few of them, and were selling for cash; he did not sell any goods on credit; no one stayed in the store with him at that time; he had no clerk and the business was operated in his name all during the time from March, 1907, on up until some time in 1908; that he had the key to the store; that the bills that were made by the store were paid by him and goods were bought in his name.

[Beasley, et al. v. Burroughs & Taylor Co.]

"The witness further stated that there was another agreement between him and Beasley, at the time of the execution of the mortgage, that Mr. Beasley told him that he believed that by managing the business properly that it would pay them to remain on in the business, and he would carry the amount for him, if he (Parish) would secure it. That was before he gave him the first mortgage. The last one, he agreed to do the same thing, and, if he (Parish) would go ahead and run it under his (Beasley's) direction, he (Beasley) would assist him in every way that he could; that he would stand by him in running it.

"The witness stated that Mr. Beasley told him that he would not allow him over \$50 per month; if the business warranted it, that he would allow him (Parish) these running expenses there; that if the business ran over \$50 a month he would allow him \$50 a month for a salary, but it wasn't to exceed \$50 a month."

(1) The trial court gave the affirmative charge for the plaintiff, on the theory that the mortgage was in violation of section 4287 of the Code, which is leveled against conveyances in trust for the grantor, and declares such conveyances void in favor of existing or subsequent creditors.

This statute has been before this court for construction in many cases, some of which are cited in the notes or annotations to this section in the Code. Every case must depend upon its own particular facts; but there are certain general principles, announced in many cases, which we think control the decision in this case, and render the mortgage void at the suit of the mortgagor's creditors, in a court of law or of equity. In the case of *Albes v. Keith-Simmons & Co.*, 152 Ala. 454, 44 South. 693, one of these principles is stated as follows: "It has been uniformly held by this court that, where the law day of a mortgage is fixed at a future date, when the mortgagee may take possession of the mortgaged property for the purpose of foreclosure, the mortgagor is impliedly left in possession of the property, and if the property employed in trade is of a shifting character, as a stock of goods in a store, the mortgagor has the implied power to sell and dispose of the property; and this constitutes the reservation of a benefit to the mortgagor, which stamps the mortgage as fraudulent in law against creditors.—*Roden & Co. v. Norton & Co.*, 128 Ala. 129 [29 South. 637]."

The case at bar is brought squarely within this rule by the undisputed evidence. The facts in this case are not distinguish-

[Beasley, et al. v. Burroughs & Taylor Co.]

able in legal effect from the facts in the case of *Roden & Co. v. Norton & Co.*, 128 Ala. 129, 29 South. 637, or those in *Birmingham Dry Goods Co. v. Roden & Co.*, 110 Ala. 511, 18 South. 135, 55 Am. St. Rep. 35. The mortgages in each of these cases were declared void by the court.

(2) It is very true that the mere fact that the mortgagor is employed by the mortgagee and paid a salary, before or after the mortgage is executed, and is authorized as the agent of the mortgagee to sell the goods in the regular course of trade or otherwise, would not be such a reservation of a benefit as to render the mortgage void.—*Murray v. McNealy*, 86 Ala. 234, 5 South. 565, 11 Am. St. Rep. 33; *Richardson v. Stringfellow*, 100 Ala. 416, 14 South. 283; *Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374. The record in this case, however, and in the cases cited above, of 128 Ala. 129, 29 South. 637, 110 Ala. 511, 18 South. 135, 55 Am. St. Rep. 35, and 152 Ala. 452, 44 South. 693, shows a great deal more than this. This record shows that the business mortgaged was in fact carried on in the name of the mortgagor, and largely for his benefit, and that he did in fact and in law receive benefits from it. While the provisions in the mortgage in question are somewhat different from those in the other cases, the undisputed evidence shows that by the parol agreement the mortgagor was to receive a benefit, and that he did receive benefits, by virtue of the mortgage, which he would not have received but for the parol agreement; and hence the case must fall within the condemnation of the rule of the decisions, and of the statute cited above.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS., JJ., concur.

[Greer v. Malone-Beall Co.]

Greer v. Malone-Beall Co.

Assumpsit.

(Decided June 1, 1916. 72 South. 28.)

1. **New Trial; Grounds; Jury Panel.**—The presence on the jury of two persons stricken by defendant, and not selected as a part of the jury to try the cause, was good grounds for a new trial, where this was unknown to defendant and his counsel before judgment rendered.

2. **Same; Waiver.**—If after discovering the presence of such person on the jury panel, defendant had reasonable time and facility to interpose an objection before verdict, a failure to do so would be a waiver of the error, since he would have no right to speculate on a finding favorable to him, and afterwards complain of error.

3. **Same; Negligence.**—If defendant or his counsel had personal knowledge of the appearance and identity of the stricken jurors, their failure to note their presence on the panel during the trial would have been such negligence as to foreclose any complaint on that ground.

4. **Appeal and Error; Presumptions.**—Where the bill of exceptions does not purpose to set out all the evidence, and does not show any negligence by defendant with respect to the presence on the panel of two persons stricken by defendant, and not otherwise selected, it will be presumed on the appeal that the trial court was cognizant of the facts which justified its action in granting the new trial.

5. **New Trial; Error in Panel; Negligence.**—A brief delay by defendant in interposing objection to the presence on the panel after the trial of jurors which had been stricken by him, was not per se a waiver of his right in the premises.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Assumpsit by P. E. Greer against the Malone-Beall Company. There was judgment for plaintiff, which on motion of defendant was set aside and new trial ordered, and plaintiff appeals. Transferred from Court of Appeals under Acts 1911, p. 450, § 6. Affirmed.

Among the grounds for the motion is the following: (4) A struck jury to try said cause was demanded, and the names of Monroe Zorn and Otis Fulford were stricken by parties to this cause, and by the defendant, and were not selected as a part of the jury to try said cause. These two persons, however, in some way, got to be members of said jury, and were on the panel of jurors which tried said case, and the other two persons who were

[Greer v. Malone-Beall Co.]

selected, and whose places these persons took, did not sit as jurors in said cause. The fact that Zorn and Fulford were on this jury was not known to defendant or his attorney, or at least he did not detect their presence during the trial of the cause, and did not know of it until the next day when another jury to try another case was being selected, and while the jury were out deliberating upon their verdict.

The evidence supported the averments of the motion, and the motion was granted, and the judgment set aside. It does not appear from the bill of exceptions how much, if any, time elapsed between defendant's discovery of the mistake in the jury panel, and the bringing in of a verdict, nor whether defendant's motion was made with reasonable promptness, nor does the bill of exceptions purport to show all the evidence before the trial court on the hearing of the motion.

A. E. PACE, and W. L. LEE, for appellant. W. O. MULKEY, for appellee.

SOMERVILLE, J.—(1) The error in the jury panel, being unknown to defendant and his counsel, was very clearly a good ground for new trial, if the objection was not waived by unreasonable delay in its assertion.

(2) If, after its discovery, defendant had reasonable time and facility for interposing his objection before the verdict was returned, his failure to do so would doubtless have been a waiver of the error; for he would have had no right to thus speculate on the chance of a favorable verdict and afterwards complain of the error.—*Hoskins v. Hight*, 95 Ala. 284, 11 South. 253.

(3) So, if defendant or his counsel had personal knowledge of the appearance and identity of the stricken jurors, their failure to note their presence on the panel during the trial would no doubt have been such negligence as to foreclose any complaint of the verdict on that ground.

(4, 5) But the bill of exceptions, which does not purport to set out all the evidence before the court on the motion, does not show any negligence by the movant in either particular, and we must presume that the trial court had cognizance of facts, if any there could be, which would justify its ruling; and we conceive that movant's counsel may have been engaged in the trial of another cause at the moment of discovery, which could not be

[Hackett v. Cash.]

conveniently suspended, or else the verdict may have been returned within a few minutes, or even seconds, thereafter. In either event, we would not be willing to declare that defendant's brief delay was per se a waiver of his rights in the premises.

For these reasons the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Hackett v. Cash.

Assumpsit.

(Decided May 11, 1916. 72 South. 52.)

1. **Appeal and Error; Review; Finding of Fact.**—Statutes providing that on an appeal from a judgment entered by the trial court sitting without a jury, the appellate court shall review the action of the trial court without any presumption in favor of its finding, and render such judgment as the trial court should have rendered, have application only when the opportunities of the appellate court to consider the evidence is the same as that afforded to the trial court, and the appellate court will not disturb the conclusions or findings of the trial court where the finding is based on evidence which is given ore tenus, or partly so, unless it appears that such findings and conclusions are plainly and palpably contrary to the weight of the evidence.

2. **Same.**—Acts 1915, p. 824, is not intended to require the appellate court to disregard the finding of the trial court upon the facts when such trial court had better opportunity to pass on the evidence than the appellate court, and if so intended it would be an invasion by the legislature of the judiciary.

3. **Damages; Contract to Transfer Insurance; Breach.**—Where plaintiff sued defendant on a promissory note given for the sale of real estate, and defendant set up as a counter claim a breach of contract to transfer a fire insurance policy on the property sold, and the house burned, defendant's damages were what could have been realized on the policy if it had been properly transferred, which was the value of the property destroyed, not to exceed the amount of the policy, and the fact that the insurance company might have declined to receive defendant as a beneficiary, was no answer thereto, where it appeared that plaintiff made no effort to assign the policy and have defendant made the beneficiary as per the agreement.

4. **Same; Set off and Counter Claim; Pleading.**—Where defendant set up recoupment as for breach of a contract by plaintiff to transfer a fire insurance policy, proof by defendant of the contract and its breach, the destruction of the property insured and the policy, met the burden of proof, and made out a prima facie case as to damages.

[Hackett v. Cash.]

5. **Same.**—After defendant had made out such a *prima facie* case the burden passed to plaintiff to show that the policy could not have been enforced if he had complied with his contract to properly transfer it, by showing why and wherein it could not be enforced.

6. **Insurance; Fire; Payment to Mortgagee.**—Where a policy of fire insurance is upon the interest of the mortgagee, and does not accrue to the benefit of the mortgagor, the insurance company has a right to pay the mortgage, and take an assignment, or to become subrogated to the rights of the mortgagee, in case there is no assignment.

7. **Same; Payment to Mortgagee; Subrogation.**—Where a policy of insurance is taken by the owner for his own benefit, but payable to the mortgagee as his interest may appear, payment to the mortgagee would extinguish the mortgage indebtedness.

8. **Damages; Contract to Transfer Fire Policy; Pro Rata Clause.**—Where defendant set up counter claim for breach of contract to transfer a fire insurance policy, his damages could not be scaled, upon the *pro rata* clause in the policy in the proportion the policy bore to another policy, in which defendant did not participate.

9. **Insurance; Fire; Additional or Other.**—Where both the mortgagor and the mortgagee have separate insurance upon their respective interests, then neither policy can be said to be additional insurance with respect to the other policy; the terms “additional” and “other” as used in policies providing a forfeiture, means the same insurable interest in the property.

10. **Same.**—Where a policy of fire insurance permitted \$1,000 additional insurance, it could not refer to a policy to which insured is not a party, and of which he knew nothing, but meant subsequent insurance.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Assumpsit by Thomas L. Hackett against Will Cash. From a judgment for defendant on his plea of recoupment, plaintiff appeals. Affirmed.

Plaintiff sought to recover on 14 promissory notes. The defendant set up that he bought a house and lot from Mr. Hackett, the purchase price being \$2,200, including a \$1,600 mortgage which was assumed by Cash in the purchase, the defendant paying \$100 in cash, and agreeing to pay \$30 per month, for which he executed the notes and mortgages sued on; that at the time of the transaction Hackett sold Cash an unexpired insurance policy for \$1,500, which Hackett claimed the original mortgagee Loeb held; that Hackett sold the policy to him, but never transferred it; that the house was worth \$2,000, and burned, and Cash had never collected anything on the \$1,500 policy, but that he held another policy on the house and some furniture, which he took out himself, and on that policy he collected about \$200; and that the premium on the unexpired term of the \$1,500 policy entered

[Hackett v. Cash.]

into and was a part of the consideration of the notes sued on. It was admitted in open court between the parties that at the time of the trial Mr. Loeb held a mortgage on the property of \$1,600, which mortgage was made previous to the time that Hackett bought the property, and was assumed by Hackett when he bought it, and by Cash when he bought from Hackett; that at the time of the fire there was in existence one policy in the Royal Exchange Assurance Company for \$1,000, originally issued to Ivey, who sold the property to Hackett, and subsequently transferred by the company to Hackett, and that this policy was held by Mr. Loeb, the mortgagee, and contained the usual standard mortgage clause; that there was also a policy in the Glens Falls Insurance Company for \$1,500 in the name of Thomas L. Hackett, which was in the possession of Mr. Loeb, and about which this case arose, which contained the usual loss payable form, and further provided that "This entire policy shall be void if insured now have or shall hereafter make or procure any other contract of insurance, whether vaild or not, on the property covered in whole or in part by this policy."

There was judgment for defendant on the plea of recoupment in the sum of \$1,123.

STEINER, CRUM & WEIL, for appellant. WEIL, STAKELY & VARDAMAN, for appellee.

ANDERSON, C. J.—(1, 2) Whether or not the act of 1915 (page 824) regulating appeals from the judgments of the court without a jury applies to this case, which was tried before the statute was enacted, we need not decide, for the reason that it wrought no change from the present practice of the city court of Montgomery as to the weight to be accorded the finding of the trial court upon the facts, and which, with many other similar statutes, has been construed to mean that it can only apply where the opportunities of this court to consider the evidence is the same as the trial court, that is, when the evidence was taken by deposition; but when the evidence is ore tenus, or partly so, and the trial court has the advantage of seeing and hearing the witnesses, this court will not disturb the conclusion unless it is plainly and palpably contrary to the weight of the evidence.—*Thompson v. Collier*, 170 Ala. 469, 54 South. 493, and a long line of decisions there cited. The Legislature evidently intended, by

[Hackett v. Cash.]

this act of 1915, to provide for trials without a jury in all courts unless it was demanded, and to do away with the necessity of excepting to the finding or conclusion upon the facts in order to review the same in the appellate court, but did not mean to override a long line of the decisions of this court as to what weight would or would not be accorded the conclusion of the trial court upon the facts. Moreover, if it was otherwise intended, it would be an invasion of the judiciary to require this court to disregard the finding of the trial court upon facts when said trial court had a better opportunity to pass upon and consider the evidence than the appellate court. We hold that the trial court did not err in finding that the plaintiff agreed to assign the policy and to do so in a proper and legal manner, which included having it transferred upon the books of the company.

(3) It is next insisted that, even if there was a breach, the defendant sustained no damages, for the reason that the policy was noncollectable, even if it had been properly transferred upon the books of the company, and this record and the brief disclose quite a complicated state of affairs as to the different policies on this house and the beneficiaries thereunder. If Hackett agreed to transfer the policy and failed to do so, the appellee's damage was what could have been realized on the policy if it had been properly transferred, and which was the value of the property destroyed, not to exceed the amount provided for in the policy. Had Hackett attempted to comply with his contract and notified the company, and then the company declined to receive Cash as the beneficiary, we would have a different case, but, as he never undertook to properly transfer the policy and to notify the company, it can avail him nothing to try and excuse himself by saying the company might have rejected Cash as a beneficiary. He should have first complied with his contract and given the company a chance to do so instead of laying down on his contract and attempting to excuse himself upon the merest speculation that the company would not have accepted Cash in his place.

(4-7) It is true that it was incumbent upon Cash to prove his plea of recoupment, but, when he proved a breach of the contract and the destruction of the property, and introduced the policy, he met the burden, and made out a prima facie case as to damages. Then, if Hackett attempted to defeat a recovery because the policy could not have been enforced, even if he had

[Hackett v. Cash.]

complied with his contract to properly transfer same, the burden was upon him to show why and wherein it could not be enforced. This he attempted to do by showing other policies and facts as a cause for the forfeiture of the policy in question. Cash had no interest in the \$1,000 policy in the Royal Exchange Assurance Company, because this policy was void as to Hackett and Cash. This company had not been notified of the sale of the real estate from Hackett to Cash, or, for that matter, from Ivey to Hackett. Therefore under this policy Cash was not entitled to anything on his loss. Nor was the payment to Loeb, the mortgagee, of his mortgage indebtedness of any benefit to Cash, as it did not extinguish the mortgage indebtedness, the mortgage having been assigned to the companies. Moreover, while the policies may have been binding in favor of the mortgagee, Loeb, they were void as to Cash, the then owner of the property, and, such being the case, the companies had the right to pay the mortgage and take an assignment or to become subrogated to the rights of the mortgagee in case there was no assignment. This, of course, would not be the case where the policy was valid as to the owner and was procured by him for his own benefit, but payable to the mortgagee as his interest might appear; for in the last instance the payment to the mortgagee would extinguish the mortgage indebtedness.—*Baker v. Monumental Savings Co.*, 58 W. Va. 408, 52 S. E. 403, 3 L. R. A. (N. S.) 79, 112 Am. St. Rep. 996, and note; 19 Cyc. 895.

(8) We are not impressed with the contention that the amount of Cash's recovery should be sealed upon the pro rata clause in the policy; that is, in proportion to what the policy in question bore to the Royal policy. This applies to insurance upon the same insurable interest, and in which Hackett, or his assignee, Cash, could participate in case there had been no forfeiture, and, as above stated, and as conceded by appellant, Hackett nor Cash had any interest in or right to the older policy.

(9, 10) It is also contended that the policy in question was void because of a clause therein contained rendering it so because of additional or other insurance; but the previous policy was upon the interest of Loeb, the mortgagee, and did not accrue to the benefit of Hackett or Cash. It is settled law that the terms "additional insurance" and "other insurance," as used in policies providing a forfeiture, means the same insurable interest in the property. If both the mortgagor and mortgagee of

[Bell v. McKay & Co.]

real estate have separate insurance upon their respective interests, then neither policy can be said to be additional insurance with respect to the other policy.—*Copeland v. Phoenix Co.*, 96 Ala. 615, 11 South. 746, 38 Am. St. Rep. 134. The appellant, however, contends that the subsequent insurance taken out by Cash himself was “additional insurance,” and the correctness of this contention may be conceded, as the policy in question permitted \$1,000 additional insurance, and evidently did not refer to the Royal policy, to which Hackett was not a party, and which he knew nothing about when procuring the policy in question, but must have meant subsequent insurance.

Finding no reversible error in the record, the judgment of the city court is affirmed.

Affirmed. All the Justices concur.

Bell v. McKay & Co.**Assumpsit.**

(Decided April 20, 1916. Rehearing denied June 1, 1916. 72 South. 83.)

1. **Arbitration and Award; Appeal.**—A judgment on an award of arbitrators is reviewable on appeal to the same extent as a judgment of the trial court itself (§ 2922, Code 1907).

2. **Shipping; Charter Party; Rescission.**—The right of the lessor to rescind a charter contract for the reason that semi-monthly payments were not made promptly in advance as provided by the contract, was lost by an unreasonable delay as to an installment due Sept. 19, and notice of rescission was not given until Dec. 1st, following.

3. **Same; Grounds; All Demands.**—Although a lessor had previously accepted tardy payments, an agreement that a contract in installment due Nov. 19, should be paid Nov. 30, was a sufficient demand for payment to support a rescission for non payment on Dec. 1st.

4. **Same; Waiver.**—Where the lessor rescinded a charter contract for a payment previously due, it was not inconsistent to subsequently accept such overdue payment.

5. **Same.**—Where a contract of installment was paid to the lessor's recently discharged agent who forwarded it to the lessor, stating that it was paid and accepted for a new period of extended service, the lessor's retention thereof was a waiver of prior default.

6. **Arbitration and Award; Review; Scope.**—Although the question submitted for arbitration may have been limited to whether defendant had a right to rescind the contract, and not to include whether he waived such.

[Bell v. McKay & Co.]

right, yet the waiver question will be decided where it has been contested throughout the conduct of the cause.

7. *Same; Entry of Judgment.*—Where the complaint both denied defendant's right to rescind the contract, and alleged his subsequent waiver of any such right, an award which merely ascertained the rightfulness of defendant's notice of withdrawal on the day it was given, determined only a part of the issues, and the court was without authority to enter a summary final judgment in favor of defendant on the award.

8. *Same.*—In such a case, the submission of the question of right to rescind to arbitration and an award does not preclude a later assertion of the proposition of the waiver of such right.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Assumpsit by Robert D. Bell against A. MacKay & Co., with attachment in aid thereof. The matter in controversy was submitted to arbitrators, and plaintiff appeals from their return. Reversed and remanded.

The defendants, MacKay & Co., leased their steamship *St. Ninian* to plaintiff's assignee, the Seeberg Steamship Line, and this action is for an alleged breach of contract by the lessors in withdrawing the steamship from the service of the lessee before the expiration of the lease. After suit was filed, and pursuant to a contract stipulation, the question whether the ship was rightfully or wrongfully withdrawn from the service of the lessee was submitted to three arbitrators, whose award was that:

"Inasmuch as the undisputed evidence shows that there was unpaid hire due on said steamship at the time of presenting written notices of withdrawal of vessel from charter (December 1st), the owners are within their right in canceling charter of said steamship Line under the terms of the charter party."

Exceptions were duly reserved to the award in accordance with section 2922, Code 1907, and notice of appeal given, and thereafter, on defendants' motion, said award was entered up as a judgment of the court, and the defendants discharged. The appeal is from this judgment, and both the judgment and the award are assigned for error.

The charter party contained the following provisions which are pertinent to the issues of this case:

"(4) That the charterer shall pay for the use and hire of said vessel nine hundred and twenty-five pounds British sterling per calendar month, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part

[Bell v. McKay & Co.]

of a month; hire to continue until her delivery in light good order and condition to the owners (unless lost) at a United States gulf port, fourteen days' notice to be given of name of redelivery port. * * *

"(6) Payment of said hire to be made in cash in Mobile at the current short sight rate of exchange, or in approved bankers' sight bills on London at owner's option, * * * half-monthly in advance, or as agreed, and in default of such payment the owner shall have the faculty of withdrawing said steamer from the service of the charterers without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter. * * *

"(10) That, if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary make a change in the appointment."

The ship entered service on April 19, 1914, and the charter money became payable per periods dating from the 19th of each month to the 4th of the following month, and from the 4th to the 19th of each month. It was payable in advance on the 1st day of each period, "or as agreed." Of the fourteen semi-monthly payments due prior to November 19th six were made strictly on the date when due, and eight on later dates, without complaint from the lessors, so far as appears. The installment due October 19th was held up pending a controversy over the retention of the captain and mate, who were charged by the lessee with drunkenness. On December 1st the lessors cabled Bestor & Young to notify lessee of their rescission of the contract, and to notify their agent, Donald, also, and on that date the notice was given to both of them.

GREGORY L. SMITH & SON, and HARRY T. SMITH & CAFFEY, for appellant. BESTOR & YOUNG, for appellee.

SOMERVILLE, J.—(1) The appeal in this case is properly taken under section 2922 of the Code. On the return of the award, it not appearing that the arbitrators were guilty of fraud, partiality, or corruption thereon, it was the duty of the clerk or judge to enter it up as the judgment of the court; and, its necessary legal effect being a discharge of defendants from liability, a judgment to that effect was properly rendered by the court.

[*Bell v. McKay & Co.*]

Plaintiff, however, excepted to the finding of the arbitrators and assigns error thereon, and we are therefore required to review the merit of their award both as to the law and facts, just as if it were originally the judgment of the trial court itself.—Code § 2922; *Wilbourn v. Hurt*, 139 Ala. 557, 36 South. 768; *Hoffman v. Milner*, 142 Ala. 678, 38 South. 758. The evidence before the arbitrators was largely documentary, and presents no substantial dispute of fact.

It is clear that defendants could, by the express terms of their charter party, declare a forfeiture of the contract and withdraw their ship from the lessee's service for any failure by it to pay an installment of charter money on the first day of each semi-monthly period, unless punctual payment were waived by particular agreement, by implication from a general course of dealing, or by recognizing the contract as continuing after the default occurred (*Andrews v. Tucker*, 127 Ala. 612, 29 South. 34; *Elliott v. Howison*, 146 Ala. 568, 40 South. 1018), or, to state the last alternative somewhat differently, by failing to exercise the right of rescission promptly and within a reasonable time (*Elliott v. Howison*, *supra*; *Re Tyrer*, 9 Aspin. 186, 84 L. T. Rep. N. S. 653.)

(2) With respect to the installment due to the lessors on September 19th for the half month ending October 4th, and which, it seems, has never been paid, the right of rescission and withdrawal was unquestionable lost by the failure of the lessors to seasonably assert it. We do not understand that any serious contention is made to the contrary. The installment due November 4th for the half month ending November 19th was paid to and accepted by the lessors' agent, on November 30th, the day before the declaration and notice of rescission was presented to the lessee, without objection by him.

(3) The defendants' right of rescission must therefore be grounded, as it in fact was, on the lessee's default in the payment due on November 19th for the half month ending December 4th. It had been agreed between the lessee and defendants' agent, Donald, that this payment should be made on November 30th, but it was not paid on that day. In the absence of a custom or agreement to the contrary, and none appears, it was the lessee's duty to tender the payment to Donald at his place of business in Mobile; and its failure to do so was a default for which rescission could have been made at that time. In so declaring we do not overlook the lessee's contention that the lessors' repeated accept-

[Bell v. McKay & Co.]

ance of charter money installments, without objection or warning, after the dates when they were strictly due, was such a waiver of the lessors' right of rescission as to suspend its future exercise in the absence of either a general warning that strict payment would thereafter be insisted upon, or an actual demand followed by refusal or failure to pay. That contention is based upon the soundest principles of law and justice. But we think it is clear that the express agreement in this case that the overdue installment should be paid on November 30th was, in effect, a demand for payment on that date within the spirit of the rule above stated.

(4) So far, then, as this installment was concerned, its payment on December 1st to Donald, who had already been discharged from the lessors' service in this behalf, and who was without authority to bind them in any way, did not prevent the rescission of the contract, notice of which was on that day given to the lessee by the lessors' new agents, Bestor & Young; for the mere acceptance by the lessors of this installment, which was overdue, was not inconsistent with their right of rescission for its delay.—*Brooks v. Rogers*, 99 Ala. 435, 436, 12 South. 61.

(5) But on December 4th—the first day of the new period ending on December 19th—the lessee paid to the ex-agent, Donald, the full amount of the charter money in advance for that period. Donald had no authority to collect this payment, and his recognition of the charter contract as still existing could not bind the lessors. Nevertheless, when he remitted this payment to the lessors, with an explicit statement that it was paid and accepted as for a new period of extended service, but two alternatives were open to them. They were bound to reject the payment entirely, or to accept it as made.

"The general rule is that, when a party indebted to the same person on more than one account makes a partial payment, he has the unqualified right to direct its application to one debt in preference to the other. The payment is voluntary, and the debtor may declare the terms upon which it is made, and the creditor must accept them, or reject the payment. If he accepts the payment, he takes it cum onere; therefore it is that, if the debtor pay with one intent which is known or communicated to the creditor, and the creditor receives with another intent, the payor must prevail."—*Pearce v. Walker*, 103 Ala. 250, 252, 15 South. 568.

[Bell v. McKay & Co.]

It can make no difference in the application of this rule that, as here, the payees were denying the existence of the obligation to which the payor applied his payment; for the reason and policy of the rule are the same in either case. By accepting the installment of charter money on December 4th, and retaining it with a knowledge of the terms upon which it was paid to and accepted by Donald, they were bound by those terms; and the legal consequence of that transaction was a waiver of previous defaults and an extension of their ship service under the charter party until its stipulated conclusion, or until another default justified its withdrawal.—*Brooks v. Rogers*, 99 Ala. 435, 12 South. 61; *Dahm v. Barlow*, 93 Ala. 120, 126, 9 South. 598.

The same result would also follow from the application of a familiar principle of the law of agency that "the principal must ratify the whole of the agent's unauthorized act or not at all, and cannot accept its beneficial results and at the same time avoid its burdens. It follows that, as a general rule, if a principal, with full knowledge of all material facts, takes and retains the benefits of the unauthorized act of an agent, he thereby ratifies such act, and with the benefits accepts the burdens resulting therefrom."—31 Cyc. 1267, 1268, and cases cited; *Crawford v. Barkley*, 18 Ala. 270, 273. Specifically:

"If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches, 'Qui sentit commodum sentire debet et onus.'"—*Wheeler, etc., Co. v. Aughey*, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638; *Hitchcock v. Griffin*, 99 Mich. 447, 58 N. W. 373, 41 Am. St. Rep. 624.

It is to be conceded, of course, that the incidents accompanying the service of a ship under a charter party like this may modify some of the principles of law which ordinarily govern the conduct of the parties. Making distant and protracted voyages which cannot be interrupted, and which do not coincide with the periods for which the hire must be paid and accepted, it is conceivable that the lessors may, even after a default, accept and retain the hire for some future period necessarily to elapse before the return of the ship, and before it could be withdrawn from

[Bell v. McKay & Co.]

service; and this might not be inconsistent with the right and the intention to rescind and withdraw under the previous default. But that qualification of the rule, even if conceded, could not be applied here, for the ship reached Ft. Morgan and was withdrawn from the charter service on December 8th. Moreover, the contingency above noted seems to have been expressly provided for by the charter party, which provides that: "Payment shall be made for such a length of time as the owners or their agents, and charterers or their agents, may agree upon as the estimated time necessary to complete the voyage."

The payment and acceptance of the installment on December 4th for the period ending December 19th had no relation to the question of a delayed return.

It results that the award of the arbitrators was erroneous as a matter of law, and the judgment will be reversed, the award will be set aside and vacated, and the cause will be remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

ON REHEARING.

SOMERVILLE, J.—The gist of the complaint is that defendants, in violation of their contract with plaintiff's assignor, withdrew their steamship from service "on the 1st day of December, 1914, and refused thereafter to further perform the said contract."

The arbitration agreement recites that: "A dispute having arisen between the owners and charterers as to the right of the owners to withdraw the steamship St. Ninian from the charter party, * * * and thereupon the said owners having demanded an arbitration of their right to withdraw said steamship from said charter party, * * * the said owners and charterers and the said R. D. Bell hereby submit to said arbitration the determination of the question whether the said owners had the right to withdraw said steamship from said charter party on December 1, 1914, pursuant to the notice given by them to that end."

The award made on December 11, 1914, is: "We, * * * having carefully considered all the evidence submitted to us in

[Bell v. McKay & Co.]

regard to the dispute as to rights of the owners to cancel charter of the British steamship St. Ninian with Seeberg Steamship Line, are of the opinion that inasmuch as the undisputed evidence shows that there was unpaid hire due on said steamer at the time (December 1st) of presenting written notice of withdrawal of vessel from charter, the owners are within their rights in canceling charter of said steamer with the Seeberg Steamship Line under terms of the charter party."

On motion of defendants the trial court entered judgment as follows (after reciting the preliminaries) :

"And, the defendants now moving the court to enter up said award as the judgment of the court in this cause, it is ordered and adjudged that the said award be, and the same is hereby, entered as the judgment of this court in this cause, and that the defendants go hence without day. It is further ordered and adjudged that the defendants do have and recover of the plaintiff the costs of court in this behalf expended, for which let execution issue."

(6) It is now contended for the first time on this application for rehearing that the sole question submitted to arbitration was whether defendants had on December 1, 1914, a right to withdraw the ship from the charter party, and that the submission did not include the question whether defendants had waived the right by their acts or conduct after that date. If we gave consideration only to the strict terms in which the submitted question is finally stated in the arbitration agreement, we might concede the merit of the contention. But there are other things to be considered :

(1) The complaint includes not only the question of the rightfulness of defendants' withdrawal from the charter party at the moment of withdrawal, but also their further refusal to perform the contract. "The pleadings and the issues formed thereby may be looked to by way of aid in determining the scope of the submission."—5 Corp. Jur. 305. This assumes of course an element of reasonable doubt in that regard.

(2) Defendants' demand for arbitration was in general terms "of their right to withdraw said steamship from said charter party."

(3) A large part of the evidence submitted to the arbitrators related solely to the questions of waiver and estoppel by and against defendants by reason of their acceptance of the install-

[Bell v. McKay & Co.]

ment of charter money for the period December 4th to December 19th, to which evidence there was no objection.

(4) The arbitrators recite that their award is "in the matter involved in said pending suit," and the award itself is upon a careful consideration "of all the evidence submitted to us in regard to the dispute as to the rights of the owner to cancel charter of the British Steamship St. Ninian with Seeberg Steamship Line."

(5) The finding is, specifically, that "the owners are within their rights in canceling charter of said steamer."

(6) The judgment of the court, following the generality of the award, includes a summary judgment for defendants upon the cause of action.

(7) The case has been argued in this court by counsel for both parties as if the submission included the entire question of breach by defendants, and their waiver or estoppel by acceptance of charter money. Much of the brief of counsel for appellant was devoted to the questions of waiver and estoppel, and those contentions are discussed by counsel for appellees on their merits, without any suggestion that they were not included in the submission.

Taking the record as a whole, we think it conclusively shows a practical construction of the scope of the submission by parties, by arbitrators, and by trial judge, which is wholly inconsistent with the contention now made. That it was the intention of both parties to determine, not only the rightfulness of defendants' notice of withdrawal on December 1st, but also the rightfulness of their permanent abandonment of the charter party, and that the proceeding was knowingly conducted to that end by the parties, we cannot seriously doubt. In such a case "it should not be allowed to either party to insist in this court for the first time that, in reviewing the rulings of the trial court, this court should do so without regard to that issue."—*Gainer v. Southern Ry. Co.*, 152 Ala. 186, 189, 44 South. 653, 653; 3 Corp. Jur. § 623; 5 Ency. L. & P. p. 77; § 10. But, if appellees' contention be conceded, what would be the result?

(7, 8) If the award merely ascertained the rightfulness of defendants' notice of withdrawal, on the day it was given, then it determined only a part of the issues involved in the complaint, and did not conclude plaintiff from proceeding with his cause in the circuit court. On such an award the circuit judge was with-

[Kellar v. Jones & Weeden.]

out authority to enter a summary final judgment in favor of defendants, on their motion or otherwise, and that part of the judgment was, upon the record itself, a sheer nullity. In so declaring we do not overlook our several decisions which hold that the submission to arbitration of one question, which necessarily assumes the determination of other preliminary questions against one of the parties, will be treated as a waiver or confession by him of such other issues.—*Ehrman v. Stanfield*, 80 Ala. 118, 121; *Thompson v. Greene*, 85 Ala. 240, 4 South. 735. But the submission of the narrower question in this case would by no means involve plaintiff's waiver of the subsequent questions of defendant's waiver or estoppel, for these questions do not arise until the first question is determined against the plaintiff.

In view of these considerations, we are constrained to deny the application for rehearing.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Kellar v. Jones & Weeden.

Assumpsit.

(Decided May 11, 1916. 72 South. 89.)

1. **Brokers; Compensation; Services.**—A broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser who is ready, able and willing to purchase on the terms named, or if he brings them together, and a sale is afterwards consummated by the seller himself.

2. **Same.**—Where a broker is working under a special contract stipulating that if the sale was made by the owner, the broker should receive half commission, such broker is entitled to the stipulated commission upon securing a prospective purchaser, and a sale by the owner to such person.

3. **Same.**—Where a broker performed all the services required of him by the owner, and the owner accepts such services, and consummates a sale to the purchaser so that nothing remains to be done except to pay the compensation promised, such broker is entitled to recover such compensation under the common count.

4. **Appeal and Error; Harmless Error; Pleading.**—Where the broker recovered a verdict which was rested upon the common count, any erroneous ruling as to a count on a written contract was without injury.

5. **Brokers; Compensation; Instructions.**—Where the action was based both upon the common count and upon a written contract, and under the evidence a recovery could be had under the common count, charges asserting

[Kellar v. Jones & Weeden.]

that unless the broker procured from the purchaser a bona fide offer for the land, he could not recover, although intended to apply to the count on the special contract, were properly refused as they would deny a recovery even upon the common count.

6. Charge of Court; Argumentative.—Argumentative charges may be properly refused.

7. Same; Singling Out Evidence.—Charges which give undue prominence to particular parts of the evidence are refused without error.

8. Same; Ignoring Evidence.—Charges which ignore evidence as to material matters in controversy may be refused without error.

APPEAL from Madison Circuit Court.

Heard before Hon. D. W. SPEAKE.

Assumpsit by Jones & Weeden against W. M. Keller. Judgment for plaintiffs, and defendant appeals. Transferred from Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

The facts and pleading sufficiently appear. The following charges were refused to defendant:

(8) Unless you are reasonably satisfied from the evidence that plaintiffs procured from Adkins a bona fide offer of \$6,000 for defendant's land, plaintiff cannot recover.

(12) I charge you that the allegations in the complaint that plaintiffs secured an offer of \$6,000 for defendant's land is a material allegation, and, unless the evidence reasonably satisfies you of the truth of this allegation, plaintiff cannot recover, and your verdict must be for defendant.

DOUGLASS TAYLOR, and CLARENCE L. WATTS, for appellant.
LANIER & PRIDE, for appellee.

GARDNER, J.—Suit by appellees against appellant for the recovery of compensation for services rendered as real estate agents in the sale of a farm owned by the appellant. The cause proceeded to trial upon the common counts, for work and labor done, etc., and count 7 as amended, which declared upon a special contract. This latter count shows a written contract, signed by the defendant, giving to the plaintiffs the exclusive agency for the sale of the farm, naming the price, fixing the commission at 5 per cent. and reserving the right to terminate the agency at any time on 30 days' notice in writing, and containing the further stipulation: "If sale is made by W. M. Keller, we agree to allow him a commission of 2½ per cent."

[Kellar v. Jones & Weeden.]

This written contract was dated January 27, 1911. It fixed the lowest cash price at \$6,500, and, as we construe its terms, the credit price at \$7,000. After setting out the written contract the plaintiffs then proceed to allege in said count that during the existence of said contract they secured an offer of \$6,000 for the land and submitted the same to the defendant, giving the name of the prospective purchaser, which offer the defendant refused to accept, but he agreed verbally to personally negotiate with the said prospective purchaser, and further agreed that, if he succeeded in selling to him, he would pay plaintiffs a commission of 2½ per cent. on the sum he might be able to secure. It is then averred that defendant did conduct further negotiations with the said prospective purchaser, and subsequently sold the land to him for the sum of \$7,000, without notifying the plaintiffs that their contract of agency was in any way revoked, but, to the contrary, while said contract was in force.

(1, 2) The following quotations from some of our cases are here in point:

"Coming particularly to the rights of real estate brokers, it may be stated as a general proposition that a broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser able, ready, and willing to purchase on the terms named, or if he brings them together and the sale is afterwards consummated by the seller himself. Again, if he introduces a prospective purchaser, and the seller undertakes to conduct the negotiations, and finally sells the property for less than the terms named in the contract, he thereby waives his right to insist on the terms of the contract, in that respect, and is liable at least for a reasonable commission, and the contract may be introduced as a guide for the jury in arriving at what is reasonable compensation. * * * "The owner of real estate cannot avail himself of the services of an agent employed by him, who procured a purchaser, to effect the sale himself to such purchaser, and thereby deprive the agent of his commissions."—*Smith v. Sharpe*, 162 Ala. 438, 440, 50 South. 383, 136 Am. St. Rep. 52.

And from *Hutto v. Stough & Hornsby*, 157 Ala. 572, 573, 47 South. 1034: "If, as claimed by the plaintiffs, they were interrupted by the request of the defendant to hold the propositions for a few days, until he could ascertain whether he could borrow the money, and during said few days, without terminating the agency, defendant continued the negotiations along the same line,

[Kellar v. Jones & Weeden.]

and concluded the sale even at a less purchase price, the brokers would be entitled to their compensation. * * * Although it is true that a broker has earned his commissions when he has procured a purchaser who is willing and able to comply with the conditions of sale fixed by the principal, yet, as shown by the foregoing authorities, the broker may be entitled to his commissions, under certain conditions, even though the final proposition was not made through him, and the property was sold by the principal, continuing the negotiations commenced by the broker, at a price less than that at which it was listed. Both parties must act in good faith."

The seventh count shows the services of the plaintiffs in securing the prospective purchaser and the acceptance of said services and the benefits derived therefrom by the defendant, and a final consummation of the sale by the defendant at his own request, and with the express understanding that he was to pay only a commission of 2½ per cent. Under the above authorities this count was not subject to any demurrer interposed thereto. See, also, *Handley v. Shaffer*, 177 Ala. 636, 59 South. 286.

(3) Moreover, if the evidence of the plaintiffs was to be credited by the jury, which seems from the verdict rendered to have been the case, they performed all the services required of them by the defendant, which services were accepted by him and the sale consummated, and nothing remained to be done except to make the payment of the compensation promised. It was therefore open to the jury to find in favor of the plaintiffs under the common counts.—*Smith v. Sharpe*, *supra*; 40 Cyc. 2832 et seq.

(4) Indeed, upon a consideration of the evidence in the case, the amount of the verdict rendered by the jury would indicate that the verdict was rested upon the common counts, and in this situation even an erroneous ruling as to count 7 would clearly be without injury.

(5) Refused charges 8 and 12 are not restricted to count 7, to which it may be assumed that they were intended to apply, but would deny a recovery upon the ground stated therein even upon the common count. There was no error in their refusal.

(6-8) The other refused charges may be condemned as argumentative, or as giving undue prominence to particular portions of the evidence.—*Council v. Mayhew*, 172 Ala. 295, 55 South. 314. Moreover, these charges would ignore the evidence for plaintiffs tending to show the services they rendered, the completion of

[Southern Dredging Co. v. Christie.]

their work, and the acceptance of the same, and of the benefits therefrom by the defendant, and their right to recovery under the common count for work and labor done.

The evidence was in sharp conflict, and was properly submitted to the jury for their determination. We see no error in the refusal of the court to give the affirmative charge. We need not discuss the testimony, though it has been most carefully considered.

No reversible error appearing, the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Southern Dredging Co. v. Christie.

Assumpsit.

(Decided May 18, 1916. 72 South. 124.)

New Trial; Ground; Surprise.—Where no motion for a continuance or postponement was made at the time of the giving of the evidence, a party is not entitled to new trial because taken by surprise by certain testimony.

APEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Action by S. L. Christie against the Southern Dredging Company. Judgment for plaintiff and from a judgment overruling motion for new trial defendant appeals. Affirmed.

Transferred from the Court of Appeals.

R. H. & R. M. SMITH, for appellant. RICKARBY & AUSTILL, for appellee.

SOMERVILLE, J.—The appeal is from a judgment of the trial court overruling a motion for a new trial. The motion was based upon the grounds: (1) That the verdict of the jury was contrary to the evidence; and (2) that defendant was taken by surprise by the testimony of plaintiff with respect to the manner and circumstances of plaintiff's execution of a receipt purporting to be in full of the claim now sued on.

[Finney v. Studebaker Corporation of America.]

We have examined the evidence with very great care, and if we could assume the equal credibility of the leading witnesses, we might not hesitate to hold that plaintiff's right to recover was not satisfactorily established—this in view of the unsatisfactory character of his explanation of the settlement he made with defendant for the use of the barge for the day and a half it was actually used by defendant.

But the error of the jury, if error, is not so clear that we would be justified in setting aside their verdict, especially when the trial judge, who also saw and heard the witnesses, has refused to do so.

With respect to the other grounds of the motion, it will suffice to say that: "Defendant having failed to move a continuance or postponement, and proceeded voluntarily with the trial, he was in no position, after the case was decided against him, to ask for a new trial on the ground of such alleged surprise. Having speculated upon the chances of a favorable result upon the evidence then before the court, and lost, he cannot now demand another trial that he may introduce other evidence not available to him on the first trial."—*Simpson v. Golden*, 114 Ala. 336, 21 South. 990; *Hoskins v. Hight*, 95 Ala. 284, 11 South. 253.

It results that the judgment of the city court must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Finney v. Studebaker Corporation of America.

Assumpsit.

(Decided May 18, 1916. 72 South. 54.)

1. *Sales; Vesting Title.*—Where the seller of three automobiles shipped them with bill of lading attached to draft, which was understood by the purchaser to be a shipment C. O. D., but omitted the price of one of the cars from the draft, the seller did not part with the title to such car.

2. *Actions; Common Count; Waiving Tort.*—The sale of an automobile by the purchaser without the consent of the seller, title having been retained by the seller, was a conversion of the property by the party who sold it, and the seller could maintain trover, or could waive the tort, and recover upon

[Finney v. Studebaker Corporation of America.]

the common count after the disposition of the property for money or other property.

3. Principal and Agent; Payment by Agent; Following Funds.—Where an agent improperly paid over funds to another who acquires the money so paid for a valuable consideration and without notice, the principal cannot recover the funds unless they can be identified.

4. Appeal and Error; Review; Finding of Trial Court.—Where the evidence is given *ore tenus*, or partly so, the appellate courts will not disturb the finding of the trial courts unless plainly contrary to the great weight of the evidence.

5. Same.—Acts 1915, p. 824, merely dispensed with the jury trial unless demand is made, and does away with the necessity of excepting to the conclusion and finding of the trial court upon the facts, and does not change the rule as to the weight given the finding of a trial court upon the facts.

APPEAL from Madison Circuit Court.

Heard before Hon. R. C. BRICKELL.

Action by the Studebaker Corporation of America against D. C. Finney. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from the Court of Appeals.

S. S. PLEASANTS, for appellant. LANIER & PRIDE, for appellee.

ANDERSON, C. J.—(1, 2) It can scarcely be contended that it was not the understanding between all parties concerned that the three automobiles were to be shipped C. O. D.; that is, the bill of lading was to be attached to draft for purchase price, and was to be delivered to the consignee upon payment of the draft. It is also in effect admitted that in drawing the draft the plaintiff omitted from the same, by mistake, the price of one of the machines covered by the bill of lading, being the particular machine sold through the Athens agency to Gladish, and there is little or no doubt but what the appellant, Finney, as well as Owen Graham, not only knew of the terms of sale, but knew when paying the draft and getting the bill of lading, under which possession was obtained of all three of the motor cars, that the price of this one had been omitted from the draft, by accident or mistake, and that the plaintiff had not therefore parted with the title to said car. The plaintiff not having parted with the title to the car in question, the sale of same either by Graham or Finney was a conversion of the plaintiff's property, and for which it could have maintained trover, or could waive the tort action and

[Finney v. Studebaker Corporation of America.]

recover upon the common counts after a disposition of the car for money or other property by Graham and Finney, or either of them.—*Moody v. Walker*, 89 Ala. 619, 7 South. 246; *Lytle v. Bowdon*, 107 Ala. 363, 18 South. 130; *Bradford v. Patterson*, 106 Ala. 397, 17 South. 536. There is no dispute over the fact that the car was sold through an Athens agency, Graham claiming that Finney made or authorized the sale, while Finney claimed that he had nothing to do with the sale of the car in question, but admits that Graham turned over to him \$777 of the purchase money, which he knew was the proceeds of the sale of the car, less the commission of \$100 retained by Graham.

"It is well understood everywhere that the action for money had and received is a liberal and equitable action, and upon principles of natural justice and equity will be supported, when the defendant has received money which in good conscience he ought not to retain, and which, ex equo bono, belongs to the plaintiff. The law implies a promise that he will pay it; and the only privity between the parties that need be shown in such an action arises from this promise implied by law that the defendant, having in his hands money which belongs to the plaintiff, will pay it over to him."—*Steiner Bros. v. Clisby*, 103 Ala. 181, 15 South. 612; and cases there cited.

(3) This holding conflicts in no way with the case of *M. & M. R. R. Co. v. Felrath*, 67 Ala. 189, as we deal with a man who had notice that the money he received was the proceeds of the sale of the plaintiff's car, even if he was not a party to the sale. In the *Felrath Case*, *supra*, the court laid down the correct rule, that a principal could not recover money, though improperly paid over by his agent to another, which cannot be identified, if it was paid over to another who acquired it for a valuable consideration and without notice.

(4, 5) We think that the evidence in this case fully warranted the conclusion and finding upon the facts, by the trial court, sitting without a jury, but, as the evidence was ore tenus, or partly so, the trial court saw and heard the witnesses, and had an advantage over this court in considering and weighing the evidence, and we would not disturb the conclusion unless plainly contrary to the great weight of the evidence.—*Thompson v. Collier*, 170 Ala. 469, 54 South. 493, and cases there cited. Whether or not the act of 1915 (page 824) should be applied to this case, it having been tried before the enactment of same, matters not,

[Fidelity-Phoenix Fire Insurance Co. v. Ray.]

as it does not change the rule as to the weight to be given a finding upon the facts by the trial court as laid down in the *Thompson Case*, *supra*, and cases there cited.—*Hackett v. Cash*, *infra*, 72 South. 52. This act merely dispenses with jury trial unless demand is made, and does away with the necessity of excepting to the conclusion upon the facts, in order to review same in the Appellate Court, and applies the same rule, and by similar language, as existed in practice acts considered and construed in the *Thompson Case*, *supra*, and cases there cited, and was reenacted and extended to all trial courts with the settled interpretation that had been previously given same.—*Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

The judgment of the circuit court is affirmed.
Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

Fidelity-Phoenix Fire Insurance Co. v. Ray.

Assumpsit.

(Decided May 11, 1916. 72 South. 98.)

1. **Insurance; Fire; Limitation; Waiver.**—Where, at the time of the issuance of the fire insurance policy, plaintiff fully advised defendant's agent that there was a mortgage on the property, and the property was sold under foreclosure proceedings under the mortgage before the loss, the insurance company could not refuse payment under a provision in the policy that it should be void if the interest of the insured be other than unconditional and sole ownership of the property.

2. **Same.**—A provision in a policy that it should be void if foreclosure proceedings be commenced or notice of the foreclosure sale of the property be given with knowledge of the insured, was waived under a provision of the policy authorizing the insurance company to cancel the policy by giving five days' notice, where the insurance company failed to cancel the policy, it having knowledge that the property was advertised for sale for three weeks.

3. **Agency; Authority.**—An insurance company is bound by the ostensible or apparent authority of its agents; the test being his actual power as held out to the world, in the absence of knowledge of limitations thereon on the part of persons dealing with such agent.

4. **Same; Forfeiture; Waiver.**—By denying liability on one ground of forfeiture alone, an insurance company waives all other grounds of forfeitures or breaches of the conditions of the policy.

[Fidelity-Phoenix Fire Insurance Co. v. Ray.]

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Action by C. G. Ray against the Fidelity-Phoenix Fire Insurance Company. Judgment for plaintiff and defendant appeals. Affirmed.

CHARGES A. CALHOUN, for appellant. FINCH & PENNINGTON, for appellee.

GARDNER, J.—Suit by appellee against appellant, substantially in Code form, on a fire insurance policy. This is the second appeal in the cause. See *Ray v. Fidelity-Phoenix Ins. Co.*, 187 Ala. 91, 65 South. 586.

The defense of failure on the part of the plaintiff to make and render to the defendant company within 60 days after the fire proof of loss as specified in the policy, and the replications of the plaintiff with reference to such pleas, were treated by this court on the former appeal and need no comment here.

(1) The defense was pleaded in plea 5 that the policy contract provided that the policy should be void if the interest of the insured be other than unconditional and sole ownership of said property, and that at the time of the issuance of the policy there was a mortgage on said property which was unknown to defendant or its authorized agent, and at the time of the loss complained of said property had been sold under a foreclosure proceeding under the terms of said mortgage; one J. B. Whitehead being the purchaser.

In replication 4 to plea 5 plaintiff set up that one McLaughlin was the agent of the defendant and that as such agent he countersigned the said policy of insurance and issued it, or procured its issuance, to the plaintiff; and that before and at the time of the issuance of said policy the plaintiff fully advised said McLaughlin as such agent, and fully disclosed to him the character of his title, and that, with full knowledge of the true condition of the plaintiff's ownership and title, said agent issued plaintiff the insurance, accepting the premium thereon, and delivering the policy to plaintiff. The sufficiency of this replication was challenged by demurrer, which was overruled. This ruling was without error.—*Pope v. Glens Falls Co.*, 130 Ala. 356, 30 South. 496.

(2) The defendant, by plea 2, invoked the further defense that the policy contract provided that the same should be void if,

[Fidelity-Phoenix Fire Insurance Co. v. Ray.]

with the knowledge of the insured, foreclosure proceedings be commenced or notice given of any property covered by virtue of any mortgage, and that said property had been mortgaged by the plaintiff and sold under the power of sale therein, of which sale the plaintiff had notice, and that the foreclosure deed was delivered and the sale made prior to the loss.

The plaintiff in replication 6 to said plea 2 answered that there was a provision in said policy authorizing the defendant to cancel the same by giving five days' notice of such cancellation, that the defendant had knowledge that the property covered by said policy was advertised for sale under the power contained in said mortgage for three weeks before it was sold under said power, and that the defendant, with full knowledge of said facts, failed to cancel the policy of insurance and thereby waived said condition.

"The stipulations in the policy against the increase of hazard are provisions inserted in the contract for the benefit of the insurer, and it is a well-settled principle of law that such provisions may be waived by the acts and conduct of the insurer."—*Cassimus Bros. v. Scottish Union, etc., Co.*, 135 Ala. 256, 33 South. 163.

In the above-cited case replications 12, 13, 14, and 15 were held not subject to demurrer. These replications invoked the same principle as sought to be applied in replication 6 in the instant case. See, also, note to case of *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 130.

(3) Counsel for appellant also argues that the replications are insufficient for the failure to allege that the agent had authority from the company to waive any condition or forfeiture. This argument, however, leaves out of view the rule of law that in such cases it is the agent's ostensible or apparent authority—that which he is held out to the world to possess—which is the test of his actual power in the absence of knowledge of limitations thereon on the part of persons dealing with such agent.—*Penn. F. I. Co. v. Draper*, 187 Ala. 103, 65 South. 923.

(4) Some of the replications invoke the principle that the defendant, by denying liability upon one ground of forfeiture alone, waived all other grounds of forfeiture or breaches of the conditions of the policy, as recognized by this court (*Ga. Home Ins. Co. v. Allen*, 128 Ala. 451, 30 South. 537), and were not subject to demurrers.

[State, ex rel. Brown v. Slaughter.]

Much stress is laid in argument of counsel upon the refusal of the court to give the affirmative charge for the defendant. We deem it unnecessary to discuss the evidence in the case. It has, however, been carefully considered, and we are of the opinion that it was sufficient for submission to the jury of the issues presented by the pleading, and that the charge was properly refused.

It is also urged that the court below erred in refusing a new trial on the ground that the verdict was contrary to the great weight of the evidence. In this connection we are invited by counsel for appellant to depart from the rule announced in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738. The rule as there announced has been consistently followed by this court for many years, and is too well established to be now disturbed. Nor, indeed, are we persuaded by the argument that there is any sound reason for its overthrow. The evidence in the case has been carefully examined in the light of this rule, and we are not prepared to say that the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust.

The few remaining questions presented are found to be without merit.

It results that the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

State, ex rel. Brown v. Slaughter.

Mandamus.

(Decided February 23, 1916. Rehearing denied March 30, 1916.
71 South. 416.)

Statutes; Special; Time of Election.—Local Acts 1915, p. 394, § 1, does not violate the provisions of subdivision 29, § 104, Constitution 1901, nor the provisions of § 105, Constitution 1901, as it merely provides that the appointees thereunder shall hold office until 1920, when their successors shall be elected, and makes no attempt to provide how or in what manner they shall be elected.

[State, ex rel. Brown v. Slaughter.]

APPEAL from Monroe Law and Equity Court.

Heard before Hon. W. G. MCCORVEY.

Petition by the State of Alabama, on the relation of J. E. Brown, for mandamus to I. B. Slaughter, Judge of Probate, to require said judge to file the committee selected by petitioner, together with the committee's acceptance, in accordance with the Corrupt Practice Act. From a decree denying relief, petitioner appeals. Affirmed.

The petition alleges that I. B. Slaughter is judge of probate of Monroe county; that petitioner is over the age of 21 years and a qualified elector in Monroe county; that on December 14, 1915, petitioner made a public announcement of his candidacy for membership on the board of revenue of Monroe county, to be held at the general election which will be held throughout the state of Alabama during the year 1916, and in connection therewith, and in pursuance of the Corrupt Practice Act, he presented in writing to said Slaughter, as judge of probate, to be filed, the name of his committee and the acceptance and agreement of such committee to act for him in the management and control of such funds, as may be used in and about the candidacy of his said office, a copy of which was attached, but that said I. B. Slaughter, as such judge of probate, refused to file such statement, selection, or nomination, on the ground that the last Legislature of Alabama provided that the next election to the office of board of revenue of Monroe county should be postponed until 1920. Petitioner alleges that the act aforesaid was a local act, and provided for the conducting of an election in violation of section 104, subd. 29, Const. 1901, and for the further reason that it is violative of section 105 of the Constitution, as the time of election to such office is provided for by a general law.

CHARLES HYBART, for appellant. HARE & JONES, for appellee.

PER CURIAM.—Section 1 of the act of 1915 (Local Acts, p. 394), creating a board of revenue for Monroe county, etc., merely creates a board of revenue in lieu of county commissioners, prescribes the duties thereof, and provides for the term of office. It does not attempt to deal with elections, county boundaries, etc., as forbidden by subdivision 29, § 104, of the Constitution of 1901.

Nor is said section 1 repugnant to section 105 of the Constitution upon the idea that the thing done or the relief sought is

[In re Mitchell.]

provided by a general law. Said section 1 merely provides that the appointees shall hold office until 1920, when their successors shall be elected, and makes no attempt to provide how or in what manner they shall be elected, and they will naturally and properly be elected in 1920, under the general election law.—Section 334 of the Code of 1907. The law and equity court did not err in sustaining the demurrers to the petition for mandamus and in denying said petition, after the petitioner declined to amend or plead further, and the judgment is affirmed.

ANDERSON, C. J., and SAYRE, GARDNER, and THOMAS, JJ., concur.

In re Mitchell.

Contempt Proceedings.

(Decided March 27, 1916. 71 South. 467.)

ORIGINAL proceedings in Supreme Court.

Be it ordered by the court that one James A. Mitchell, Esq., of Birmingham, Ala., be and is hereby cited to appear before this court at Montgomery, Ala., on Monday, the 27th day of March, 1916, and then and there show cause why his name should not be purged from the roll of practicing attorneys in this court, and why he should not be adjudged guilty of contempt of this court (one or both), because of the writing, publishing, or utterance of a certain publication appearing in a weekly newspaper called the Alabama Democrat, published at Montgomery, Ala., on February 10, 1916, in words and figures, as follows, to-wit (the substance of which sufficiently appears in the specifications) :

SPECIFICATIONS.

Be it ordered by the court that whereas, James A. Mitchell, Esq., a practicing attorney of Birmingham, Ala., and whose name appears upon the roll of attorneys of this court, was on the 21st day of February, 1916, cited to appear on March 27, 1916, and answer said citation, the issuance of same having been induced by a certain publication of February 10th in the Ala-

[In re Mitchell.]

bama Democrat, and a copy of which was set out in hæc verba as an exhibit:

Now, therefore, in order that the said Mitchell be specifically informed as to the part or parts of said publication that impressed the court as transcending the bounds of privileged criticism and which caused the said citation, the following specifications are made:

(1) First. In criticising and commenting upon the opinion in the case of *Ex parte Seals Piano & Organ Co.*, 188 Ala. 443, 66 South. 146, you dealt with a cause that was pending in this court for final decision, and you are called upon to answer whether or not you knew of the pendency of said cause, and whether or not your attack upon the first opinion was made with the intent of intimidating or influencing the court upon the final determination of said cause.

(2) Second. In your criticism of and comment upon the opinion of this court in the case of *Manfredo v. Manfredo*, 191 Ala. 322, 68 South. 157, appears the following language:

"I accepted the decision in this case, however, with patience, barring possible temporary observations more or less vituperative, and finally concluded that, as my clients were foreigners, it might have been expecting too much to look for a decision in their favor against a widow residing here."

(3) Third. In the criticism of and comment upon the opinion of this court in the case of *Sulzby v. Palmer*, *infra*, 70 South. 1, appears the following language:

"It looks like the court was groping around in the dark hunting for some pretext under which the complainant's rights could be defeated. It is difficult to conceive what the considerations would be which would actuate a court of last resort to go to such lengths to beat a man out of his money which he had loaned the defendant in good faith in order to build a home for her which had sheltered her and her family for many years."

The court entertains the opinion that the expressions above set out, not only transcend the bounds of propriety and privileged criticism, but are an unwarranted attack, direct, or by insinuation and innuendo, upon the motives and integrity of this court, and make out a *prima facie* case of improper conduct upon the part of a lawyer who holds a license from this court and who is under oath to demean himself with all good fidelity to the court as well as to his client.

[In re Mitchell.]

The respondent made the following answer :

Now comes James A. Mitchell, and for answer to the writ issued out of this honorable court on the 21st day of February, 1916, commanding him to appear and show cause why his name should not be purged from the roll of practicing attorneys in this court, and why he should not be adjudged guilty of a contempt of this court (one or both), because of the writing, publishing, or utterance of a certain publication which appeared in the Alabama Democrat, a newspaper, on February 10, 1916, and more particularly because of those certain parts of said writing specified in an order of this honorable court, copy of which is this day first received by him, says: That he appreciates full well that this honorable court would not for a moment consider that legitimate criticism uttered by this defendant in the exercise of his right to discuss the official work of officers elected to their duties by popular vote involves contempt of the most lofty positions those officers hold, and that any part or parts of said publication which may have appeared to transcend the bounds of privileged criticism he is glad to have this opportunity to explain or retract.

1. In answer to the first specification contained in the said order, by which this respondent is notified by the court that in criticising and commenting upon the opinion in the case of *Ex parte Seals Piano & Organ Company* he dealt with a cause pending in this court for final decision, this respondent says that the decision in the case *Ex parte Seals Piano & Organ Company* to which his criticism referred was upon an original application for a writ of mandamus directed to a circuit judge, and was decided by this court in July, 1914; that when he wrote the matter commenting upon the same he did not know that there was any other matter arising out of the same litigation in the court below which was still pending in this court; that he was in no way connected with the cause of action or the litigation, either as party or counsel; and that his criticism and discussion of the decision on the former appeal was in no way intended by him to influence or intimidate the court upon the final determination of the cause.

2. By the second specification in the said order the use by this respondent of the following language in connection with his criticism of the decision of this honorable court in the case of *Manfredo v. Manfredo* is noted as transcending the bounds of privileged criticism: "I accepted the decision in this case, how-

[In re Mitchell.]

ever, with patience, barring possible temporary observations more or less vituperative, and finally concluded that, as my clients were foreigners, it might have been expecting too much to look for a decision in their favor against a widow residing here."

By way of palliation of this quoted language this respondent begs leave to call to the attention of the court the well-recognized rule of this honorable court, as well as of courts in other jurisdictions, to prefer as far as possible local claimants in the application of local assets where foreign administrations or foreign assignments for the benefit of creditors are involved. This defendant appreciates, however, that for the court to have applied that rule in reaching the decision in the case in question would have involved a distinct extension of the doctrine, and an extension which the opinion does not reveal the intention of the court to have made. The use by this respondent of the quoted language was therefore highly improper, without indicating at the same time the line of reasoning which would have made his suggestion innocent. This defendant therefore hopes that the court will pardon his use of the language quoted, that it will allow him to qualify it as above indicated, and that it will accept his statement that he meant in no way to reflect upon the motives and sense of justice of the court by the use of the same.

3. By the third specification in the said order the use by this respondent of the following language in connection with his criticism of the decision of this honorable court in the case of *Sulzby v. Palmer* is noted as transcending the bounds of privileged criticism: "It looks like the court was groping around in the dark hunting for some pretext under which the complainant's right could be defeated. It is difficult to conceive what the considerations would be which would actuate a court of last resort to go to such lengths to beat a man out of his money which he had loaned the defendant in good faith in order to build a home for her which had sheltered her and her family for many years."

While disclaiming any intention to charge this honorable court with improper motives, or with any purpose beyond attempting to support what this respondent believed to be the court's first immature and erroneous conclusion upon the case, he realies on reading his article after it appeared in print, that the above language went too far, and might be construed to impugn the integrity of the court. He therefore profoundly regrets having used the language noted, prays leave of the court to retract it, and

[Ex Parte Farrell.]

apologizes for having allowed his criticism in the heat of disappointment to contain an expression capable of so misrepresenting both the intent of the writer and the motives of this honorable court.

And this defendant further says that in the writing and publishing of the said article, a copy of which is substantially set out and attached to the said writ, this respondent did not intend any contempt of or towards this honorable court, that the said publication was not made with intent to misrepresent this court, or to bring this court into contempt or ridicule, and that the words used by him in the said publication were not used by him with intention to cast upon this court or any of the members thereof any imputation or charge of corruption or lack of integrity, nor were they used with intent to embarrass or impede the administration of justice.

And now, having fully answered, this respondent prays that said rule be discharged, and that he be dismissed with his costs in this behalf sustained.

PER CURIAM.—(4) Be it ordered by the court that, the said James A. Mitchell, the respondent, having disclaimed any intention of intimidating or influencing this court by the criticism of its opinion in a pending cause, and having satisfactorily qualified, explained, and withdrawn the expressions set out in specifications 2 and 3, and apologized for the use of same, the rule nisi is dissolved, and the respondent is discharged.

Ex Parte Farrell.

Mandamus.

(Decided Feb. 10, 1916. 71 South. 462.)

Divorce; Appeal; Effect.—Notwithstanding a decree for alimony as an annual allowance is not final in the sense that it cannot be subsequently changed, yet where there was a final decree determining all the rights of the parties to the divorce proceedings, including the right to both permanent and temporary alimony, an appeal fully perfected by the execution of a supersedeas bond removed the entire proceeding to the appellate court, with the exception of collateral matters not involved in the appeal, and hence mandamus will not lie to compel the chancellor to allow temporary alimony pending the appeal.

[Ex Parte Farrell.]

ORIGINAL application in the Supreme Court.

Petition by Lucy Farrell to compel the Chancellor of the Northeastern Chancery Division to annul an order dismissing an application for alimony and suit money, pending an appeal in the divorce proceedings. Writ denied.

BETTS & BETTS, for appellant. DOUGLASS TAYLOR, and CLARENCE L. WATTS, for appellee.

MAYFIELD, J.—This is an original application to this court for a writ of mandamus, to be directed to the chancellor of the Northeastern chancery division, directing him to set aside and annul an order heretofore made by him, which order dismissed out of the chancery court petitioner's application for alimony and suit money pending an appeal from the chancery court decree which divorced petitioner from her husband and allowed her both permanent alimony and suit money for prosecuting and defending the divorce proceedings.

It was ruled by this court in the case of *Brady v. Brady*, 144 Ala. 414, 39 South. 237, that an appeal would not lie from an interlocutory order directing the payment of alimony pendente lite, and that mandamus was the proper remedy to vacate such interlocutory order or decree; and the rule has been repeatedly followed by this court in later cases. The petition to the chancellor for alimony pending the appeal, and this application for mandamus, are based on the decisions in the above indicated cases. The rulings in those cases, however, do not control the ruling in the case at hand. There is a final decree in this case, determining all the rights of the parties to the divorce, including the right to both permanent and temporary alimony. This decree will support an appeal; in fact, an appeal had been taken before the application was made to the chancellor. A supersedeas bond had been executed and approved, and the entire proceeding removed from the chancery court to this court. The chancery court and the chancellor had therefore lost all control over the parties and the subject-matter before the application was ever made to the chancellor. Assuredly, this court will not compel the chancellor to do what he has no authority to do. Had he issued the order as prayed, this court would have issued a mandamus prohibition, or other writ, appropriate and necessary to right the wrong.—*Ex parte Montgomery*, 114 Ala. 115, 14 South. 365, in

[Ex Parte Farrell.]

which case it was said, with apt reference here: "There are exceptions to the rule that 'an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal' (Elliott, App. Proc. § 541; *Allen v. Allen*, 80 Ala. 154), it is quite true (Elliott, App. Proc. § 542), but the present case is not one of them. The lower court, pending an appeal, may proceed in matters which are entirely collateral to that part of the case which is taken up, but it can do nothing in respect of any matter or question which is involved in the appeal, and which may be adjudged by the appellate court. The operation of the mandamus here prayed would be, as we have seen, to compel precisely this to be done by the court below."

Mr. Elliott in his work above cited (section 541) says: "The overwhelming weight of authority is that an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal. It is difficult to conceive how it could be otherwise, since it is not possible that two courts can have authority over a single case at the same time. The case must, of invincible necessity, be in the higher court or in the lower court, for it cannot be in both courts. As the authority of the inferior yields to the superior, the case is, for all purposes connected with the consideration and decision of the questions involved in it, completely within the jurisdiction of the appellate tribunal."

The same author (section 543) makes the pointed statement that: "Where a decree is entered in a suit for divorce, and an appeal is perfected, alimony cannot, as it has been held, be allowed during the pendency of the appeal by the trial court."

To this text is cited *Lewis v. Lewis*, 20 Mo. App. 546; *Cralle v. Cralle*, 81 Va. 773; *Pasour v. Lineberger*, 90 N. C. 159. The first two cases are exactly in point and support the text. In the Virginia case it is said: "Although, perhaps, an appeal in a chancery cause does not here, any more than in England, stop the proceedings under the decree from which the appeal is taken, yet there can be no manner of doubt but that the effect of an appeal, when fully perfected by the execution of the proper supersedeas bond, is to deprive the subordinate court of all power over the parties and subject-matter of controversy, until the cause is remanded back for its further action; and the only orders, therefore, which that court can rightfully make are such as are needful for the preservation of the res and the rights of the parties

[Ex Parte Farrell.]

pending the appeal.—*Slaughter House Cases*, 10 Wall. 273 [19 L. Ed. 915]; *Littlejohn v. Ferguson*, 18 Grat. [Va.] 53; *Moran v. Johnston*, 26 Grat. [Va.] 108.”

The Supreme Court of the United States seems to follow the same rule. In the case of *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025, it is said: “After the acceptance of the bonds for the appeal, and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In *Goddard v. Ordway*, 101 U. S. 145 [25 L. Ed. 1040], there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term. In *Droper v. Davis*, 102 U. S. 370 [26 L. Ed. 121], however, it was decided that, after a bond had been accepted by one of the judges in accordance with such an order of allowance, the jurisdiction was transferred from the court below.”

We are not unmindful of the rule, that decrees for alimony, as annual allowances, are not final in the sense that they cannot be subsequently changed. Such decrees are usually left open, and subject to be changed, as the circumstances and necessities of the case may require.—*Clisby v. Clisby*, 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110.

On appeal, this court can alter or change the result in the lower court, or direct the chancery court to change it, as present or subsequent facts may justify.

Mandamus denied.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Birmingham W. W. Co. v. Hernandez.]

Birmingham W. W. Co. v. Hernandez.

Mandamus.

(Decided January 13, 1916. Rehearing denied March 23, 1916.
71 South. 443.)

1. **Waters and Water Courses; Public Supply; Connection.**—The rule that a water company must extend the same public service without discrimination to all in like circumstances, does not require the water company to make connections for private consumers.

2. **Same.**—The charter of a water works company authorizing it to distribute water and lay pipes and make excavations through streets, alleys or public grounds, creates no duty on the company to do more than lay its mains, since it cannot compel the owner of property to take water; hence, the question whether connections for private consumers should be made at the expense of the company or the consumer, depends upon the contract between the company and the consumer.

3. **Municipal Corporations; Streets; Regulation.**—The owners of property abutting upon a city street have the right of access to it for the purpose of excavating and laying connections for water mains for similar purposes, the right being a property right, and not illegal as a private use of public property.

4. **Waters and Water Courses; Public Supply; Maintaining Service Pipes.**—The duty to maintain service pipes for supplying private consumers with water is the same as the duty to lay them, and rests upon the same party, whether company or consumer.

5. **Same; Franchises; Condition.**—In granting franchises for the furnishing of a water supply, municipalities may require the company, if so authorized by statute, to connect service pipes with their mains as part of the consideration for the transaction; but if the charter or contract does not so provide, such connections are left to the agreement of the parties.

6. **Same; Franchises; Construction.**—Ambiguous provisions in the grant of a public franchise will be construed in favor of the public.

7. **Contracts; Construction; Ambiguous Provision.**—Where there is nothing to the contrary in its language, the parties to a contract, by mutual consent, may interpret the ambiguous provisions for themselves, in which event the court will enforce the contract according to such interpretation.

8. **Waters and Water Courses; Public Supply; Private Consumers; Contracts.**—In the absence of special contract provisions, the courts will be slow to hold that a consumer of water has become bound by the acquiescence of other consumers, over whom he has no control, in a custom requiring consumers to pay for connection with water mains.

9. **Same; Franchises; Presumption.**—Where the municipal authorities contracted with a water company for a supply of water for the municipality, it will be presumed that they acted competently as the agent of all the people of the city, and that they knew the state of the matter in which they undertook to act.

[Birmingham W. W. Co. v. Hernandez.]

10. **Same; Connection for Private Consumer.**—In the absence of a franchise provision to the contrary, the custom of a water works company requiring private consumers to install service pipes for connection with the main, is not unreasonable, and the courts will not require such company to pay for such installation by granting a mandatory writ.

APPEAL from Jefferson Circuit Court.

Heard before Hon. C. B. SMITH.

Mandamus by Robert M. Hernandez against the Birmingham Waterworks Company to compel it to install a service pipe between its main and the property line of the relator. From a decree granting the writ, respondent appeals. Reversed and remanded.

The petition alleges that relator is a resident of the city of Birmingham, and is engaged in business under the name of the Hernandez Machinery Company, conducting a machine shop at 311 South Twelfth street in the city of Birmingham, which said premises abuts on a portion of the public streets, in said city of Birmingham; that the respondent is a public service corporation, acting under a charter granted it by the Legislature of Alabama, a copy of which is set out and attached as an exhibit; and that in June, 1888, it entered into a contract with the city of Birmingham to supply the inhabitants thereof with water, and a copy of this contract is set out and made an exhibit; that relator has applied to respondent for a supply of water in his business located as above set out, and has offered and still offers to pay respondent the usual water rates, and to comply with all the reasonable rules and regulations, except as to laying or installing of service pipes, from defendant's water mains or pipes in the streets, abutting said property, to the property line of said premises; but that respondent refused, and has refused, to provide said service pipe between said line.

PERCY, BENNERS & BURR, for appellant. ROMAINÉ BOYD, and M. M. ULLMAN, for appellee.

SAYRE, J.—The question in this case arises out of an application by Hernandez for a writ of mandamus to compel the Birmingham Waterworks Company to lay at its expense a lateral or service pipe line from its main to the premises of the petitioner, who desires to be supplied with water.

Respondent is exercising charter powers under and by virtue of the special act of incorporation approved February 13, 1885

[Birmingham W. W. Co. v. Hernandez.]

(Acts 1884-85, p. 415 et seq.). This charter authorized respondent "to send and distribute water throughout the said city and places adjacent thereto," and "to lay pipes for conducting its water, and to make excavations through any of the streets, alleys or public grounds of the said city of Birmingham by and with the consent of the corporate authorities of said city." This charter provided that the company should have "the right to make contracts with individuals and corporations for the water to be supplied by it, and to charge for the water to be supplied by it, and to charge for and collect such water rates and compensation therefor as may be contracted to be paid by them." Respondent is also exercising its charter powers in the city of Birmingham under an ordinance-contract with the municipal authorities into which the parties entered on June 2, 1888. This contract provided for certain maximum flat and meter rates at which water was to be furnished by respondents to domestic consumers, and contained the following stipulations, which, it is supposed, must exert some influence in the proper decision of the controversy between the parties to this cause: "The Birmingham Waterworks Company is authorized to lay down, maintain water mains, pipes, aqueducts and other fixtures to, in and through any of the streets, avenues, alleys and public grounds in said city, for the use of said city and its inhabitants, as herein provided."

"The whole of said pipe system shall be such as to cover, supply, and keep supplied all portions of streets of the city which it may be necessary to supply, and be furnished with all the necessary and usual stop gates, special castings, air valves, blow-offs, etc."

"That all hydrants provided for under this contract shall be put in by, and at the expense of said Birmingham Waterworks Company, but shall thereafter become the property of said city, and shall be kept in repair and when worn out shall be replaced with new hydrants by and at the expense of said city."

To these things respondent's answer added averments that since it had been engaged in supplying water to the city of Birmingham, uniformly, both before and after the contract of June 2, 1888, consumers had paid the cost of laying and installing the service pipe lines between their premises and its main; that before said contract it had adopted a rule or regulations to that effect which was proper, reasonable, and such an one as had been

[Birmingham W. W. Co. v. Hernandez.]

generally maintained in cities throughout the United States, both in cases where the water supply was maintained by municipalities and as well where it was privately owned. The answer also set forth ordinances of the city of Birmingham providing that any one may make excavations in the streets for the purpose of laying service pipes on obtaining the city's permit, which is granted on the payment of a fee of one dollar and the giving of security that the street will be relaid in as good condition as it was before excavation.

The question then is, on the facts disclosed by the petition and answer, whether, on relator's application to be supplied with water, it was the duty of the respondent to lay the service pipe connecting its main with relator's premises at its own expense, or whether it might charge the cost of the work to relator.

In *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 South. 23, this court said: "In this state it is not yet settled, and, however we might be disposed to view it, we do not regard it as a willful and culpable breach of duty by respondent to now decline to furnish such pipes at its own expense; though it is proper to say that the great weight of authority in other states seems to recognize and impose the duty in question."

At this time the question is presented for a definite answer, and we have made such shift as we could to investigate anew the original authorities and the reason of the matter.

It must be now admitted that the weight of authority, if numbers may count for weight, rests with relator's side of the controversy. Some of the cases constituting this weight of authority did not really involve the precise question here presented, and some of them appear to have been influenced to some extent by general statutory provisions; but it is safe to say that the rule for which relator contends has been substantially adopted as a rule of decision in Arkansas, California, Idaho, New Mexico, Oklahoma, and Washington, as the following cases will show: *Pine Bluff Corporation v. Toney*, 96 Ark. 345, 131 S. W. 680, Ann. Cas. 1912B, 544; *Title Guarantee & Trust Co. v. R. R. Commission*, 168 Cal. 295, 142 Pac. 878; *Hatch v. Consumers Co.*, 17 Idaho, 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263; *State v. Albuquerque Water Supply Co.*, 19 N. W. 36, 140 Pac. 1059, L. R. A. 1915A, 246; *Bartlesville Water Co. v. Bartlesville* (Okl.) 150 Pac. 118; *Cleveland v. Malden Water Co.*, 69 Wash.

[Birmingham W. W. Co. v. Hernandez.]

541, 125 Pac. 769. In Texas, the Court of Civil Appeals for the Fourth Division holds to the same doctrine.

It is not without profit to note of the foregoing line of cases that it had its origin in some language, used arguendo, in *Pocatello Water Co. v. Standley* (1900), 7 Idaho 155, 61 Pac. 518, where the question was between the water company and a plumber, not the prospective consumer, and related to the reasonableness of the company's rule by which it reserved the right to make all taps of its mains and pipes. Considering the obligations of a water supply company and construing the statute of that state, the court said: "Under the said franchise the respondent * * * is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits."

That case was cited to sustain the rule in *Hatch v. Consumers Co.*, *supra*. This last case (*Hatch Case*) went to the Supreme Court of the United States (224 U. S. 148, 32 Sup. St. 465, 56 L. Ed. 703), and the decision of that court is cited in the brief for relator and was cited by the Supreme Court of Oklahoma as sustaining its ruling in *Bartlesville Water Co. v. Bartlesville*, *supra*. But the only effect of the ruling in the Supreme Court of the United States was that the judgment of the state court requiring the water company to make the service connection at its own expense impaired no constitutional right of the company which had accepted its charter in 1903, in contemplation of the duty of water companies as clearly settled by both the statute law and decisions at that time. To make the matter clear, we quote the language of the court: "The charter of the company was construed by the court below in connection with the statutes in force at the time of the construction given to those statutes in decisions made prior to such grant. We excerpt in the margin * * * a passage from the opinion in one of those cases (*Pocatello Case*). * * * That the construction thus placed upon the charter by the court below, in the light of the state of law at the time of its adoption, did not amount to an impairment of the obligations of the charter by subsequent legislation, is, we think, too clear for anything but statement."

The idea which seems to underlie all the cases holding with relator, except as they are affected by statute or ordinance, may be fairly stated as follows: Since the franchise to furnish water

[Birmingham W. W. Co. v. Hernandez.]

is affected with a public use, requiring all consumers to be served on equal terms, and since water companies have the right to excavate the streets, while private persons have not, the duty to lay service pipes, which involves excavations, and so the duty to deliver water on the consumer's premises, must devolve upon the water companies.

(1-5) We do not feel that we are constrained to adopt the relator's view of this case by the theory suggested nor by the cases which seem to adopt it as the reasonable foundation of their decisions. *City of Mobile v. Bienville Water Supply Co.*, 130 Ala. 384, 30 South. 445, in common with a multitude of cases, holds that the same public service must be extended to all in like circumstances and without discrimination. We fully recognize the obligation of that rule; but we are unable to see that it sheds any particular light upon the question whether, in the absence of contract or controlling statute or ordinance, the water company owes the consumer the public duty to furnish at its expense connections between its main and his premises. Respondent's charter operated, no doubt, as a general permit to excavate the streets in order to lay its mains and prepare its plant for the discharge of its public duty. But, so far as the laying of pipes and the excavation necessary thereto is concerned, in the beginning of its operations in any street, its whole right and duty was to lay its mains. It could not compel the owner of any abutting property to take water, and, as for anything to be found in respondent's charter and its contract with the city, respondent was left free to contract with consumers, subject, of course, to the general principle that all consumers in like circumstances should be treated alike and reasonably, and subject, also, to the stipulation for maximum rates. Either party may dig trenches for the laying of service pipes, subject always to reasonable municipal regulations. If it be said that to accord such right to the consumer is to permit a private use of the street, still the right to such use is but part and parcel of the right of access which cannot be taken, injured, or destroyed without compensation. To employ substantially the language of Judge Dillon, the abutting owner has a right of passage, and also other rights not shared in by the public at large, special and peculiar to himself, and arising out of the very relation of his lot to the street in front of it. These are rights of property. The private rights of abutters are not limited to the easement of light, air, and access. They

[Birmingham W. W. Co. v. Hernandez.]

are coextensive with the use to which the street may be by law devoted, and become integral parts of the estate of the abutting owner. In cities and towns the streets are commonly devoted to the conveyance of water, gas, and sewage, and the abutting owner's property is essentially dependent upon the use of the streets for connections with the appropriate means of conveyance.—3 Dillon Mun. Corp. (5th Ed.) §§ 1224-1227. In *McClagherty v. Bluefield Waterworks Co.*, 67 W. Va. 285, 68 S. E. 28, 32 L. R. A. (N. S.) 229, the Supreme Court of West Virginia says: "The abutting owner has the right of access to his premises through the street for coal or wood or other necessary things; the right of ingress for persons; and why may we not call this right to use the street to lay his pipe for the conveyance of water a right of access constituting a property right in the street, which he may use and of which he cannot be divested?"

And that court, establishing by its decree the legal obligation of a contract by which the consumer agreed to keep his service pipe in repair, as neither lacking in consideration nor relieving a public service corporation of its duty under the law, and knowing perhaps more of the matter of fact than we do, said, in line with an averment of respondent's answer in this case, that such was the general rule in cities and towns. There can be no distinction in principle between the duty to lay service pipes and the duty to maintain them. In the *Hatch Case*, *supra*, which, as we have seen, turned upon the construction of a statute, the Supreme Court of Idaho recognizes that the consumer may be required by ordinance to pay the expense of service connections when a statute so authorizes, and cites some case so holding. And in *State v. Albuquerque Water Supply Co.*, *supra*, the most elaborately argued of the cases upon which relator relies, the question being whether the property owner or the water company must defray the expenses of laying the service pipe from the main to the property line, the court said: "The answer to the question necessarily depends upon the construction to be placed upon the franchise and contract under which the water company operates, for it is clear that the contracting parties might legally stipulate that this burden should be borne by the consumer, or, on the other hand, that the public service corporation should assume it."

The first Missouri case on this question (*Fisher v. St. Joseph Water Co.*, 151 Mo. App. 530, 132 S. W. 288) follows the doctrine of some English cases and *State v. Gosnell*, 116 Wis. 606, 93 N.

[Birmingham W. W. Co. v. Hernandez.]

W. 542, 61 L. R. A. 33. In Wisconsin the question turned upon a statute. The *Fisher Case* was followed in *Joplin v. Wheeler*, 173 Mo. App. 590, 158 S. W. 924. The reasoning of the court in the *Joplin Case* is of interest here. In the course of its opinion, the court said: "The city argues that the franchise of the company is coextensive with the entire street, and the company's obligation is to deliver water at the property line. It is obvious that the purpose for which the waterworks system is maintained, to-wit, the supplying of the inhabitants of the city with water, can be accomplished by either method. Unless we should say that the supply of water to the inhabitants necessarily means delivering it to the consumer at the very place of consumption, a position not taken by any court, and not contended for here, then the question of who should connect the water mains by service pipes with the private property was properly a matter of contract between the city and the water company, and should have been embodied in the franchise-ordinance. That the installation and maintenance of such service pipes to the property line is not one of the necessary incidents and obligations growing out of the right and duties of the water company to supply water to the inhabitants of the city is shown by the fact that this company has for 25 years discharged its duties without so doing."

The discussion need not be further protracted; but we cite some cases looking very persuasively to respondent's view, and quote a clear, and as we think a correct, statement of the law in dispute which is found in the language of REED, D. J., speaking for the United States Court of Appeals in the case of *City of Wichita v. Wichita Water Co.*, 222 Fed. 789, 138 C. C. A. 337, a very recent case, precisely in point, in which the court evidently had before it the cases cited for relator here. The court said: "Municipalities, in granting franchises to or making contracts with private persons or corporations to furnish water to the city and its inhabitants, may require the water company, when the statute so authorizes, to connect the service pipes with the water mains as a part of the consideration that shall pay for the privilege of furnishing the water; but, in the absence of a charter or contract that so provides, the matter is left to the agreement of the parties."—*Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030; *Vinton Water Co. v. Roanoke*, 110 Va. 661, 66 S. E. 835; *Franke v. Paducah Waterworks*, 88 Ky. 467, 11 S. W. 432, 718, 4 L. R. A. 265.

[Birmingham W. W. Co. v. Hernandez.]

(6-10) The rule is well settled that ambiguous provisions in the grant of a public franchise will be construed in favor of the public. In this case we find nothing to the point one way or the other in either the respondent's charter or its contract with the city. On the subject in dispute both those instruments are dumb. Ordinarily, there being nothing to the contrary in the language of a contract, it is competent for the parties by mutual consent to interpret for themselves, in which event it is the duty of the court to enforce the contract according to the interpretation put upon it and practiced by both parties.—*Bixby v. Evans*, 174 Ala. 581, 57 South. 39; *City of Greenville v. Greenville Waterworks Co.*, 125 Ala. 625, 27 South. 764. On this point we have stated above the averments of the answer. So far as the alleged practice subsequent to the ordinance-contract of June 2, 1888, is concerned, if that contract had undertaken, though by doubtful expression, to determine the right of consumers in the respect at issue, or if the relator's contention, in the absence of contract, were determinable in his favor on any general principle of law, we would be slow to hold that he had been bound by the practice of the water company though acquiesced in by individual consumers, for he had no control over nor any responsibility for their actions in the premises. But different considerations may apply to the period, of what length the answer does not say, reaching from the time when respondent began to furnish water to consumers down to the contract of June 2, 1888. In making that contract the municipal authorities acted competently as the agent of all the people of Birmingham, then and thereafter, and it may reasonably be presumed to have known the state of the matter in which it undertook to act. Unfortunately it said nothing to the point in issue. At best, for relator we could only assume that there was a tacit understanding that respondent's previous practice had not been unreasonable nor unlawful, and the effect of this understanding would be strongly reinforced by any such universality of practice as is alleged in respondent's answer. We have stated the reason for our conclusion that the practice heretofore followed is not unreasonable, nor prohibited by any principle of general law or provision of statute or ordinance, and, on that consideration, without reference to the practice alleged, we hold that respondent has the legal right of the case, and hence that the trial court erred in sustaining the demurrer to respondent's answer.

[State v. Doster-Northington Drug Co.]

Relator refers to the decision of this court in *City of Montgomery v. McDade*, 180 Ala. 156, 60 South. 797. That case holds nothing to the contrary of what we have here said. It will be seen by reference to *City of Montgomery v. Greene*, 180 Ala. 322, 60 South. 900, on which in the main the decision in the *McDade Case* was based, that the holding was simply that if the city desired to have the water measured, it should furnish the meter, and that all consumers in the same class must be treated alike by the city in the territory in which its charter allows it to operate. In these cases the matter of laying service pipes was determined by ordinance-contract.

On the authority of the cases cited by relator, McQuillin and Pond, in their respective works on Municipal Corporations and Public Utilities, state the weight of authority as it was stated in *State v. Birmingham Waterworks Co.*, *supra*; the latter citing meter cases along with the rest. But Prof. Wyman of Harvard Law School, in his work on Public Service Corporations, after referring to the same line of cases, says: "On the other hand, there is as much authority, if not more, to the effect that the requirement by legislation or even by the regulation of the company that the consumer shall pay for his service pipe is not outrageous, as this installation is peculiarly for his benefit and no part of the general facilities of the system in the use of which all share to some degree."—Volume 1, § 824.

It results from what we have said that the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

State v. Doster-Northington Drug Co.

Taxation.

(Decided February 10, 1916. Rehearing denied March 30, 1916.
71 South. 427.)

1. **Taxation; Tax Year.**—The tax year commences October 1st, and ends September 30th following.

2. **Same; Assessment; Nature.**—The assessment and valuation of property is in its nature a judicial determination, and is final, unless impeached for fraud or lack of jurisdiction.

[State v. Doster-Northington Drug Co.]

3. **Same; Escapes.**—Section 2260, Code 1907, expressly confers upon the county tax commissioner authority to make assessments for escaped taxes for not more than five years preceding.

4. **Same; Correction; Time of Making.**—Where the county tax commissioner has duly assessed escaped taxes, and the tax payer has concurred, and the taxing authorities seek no review or annulment thereof within the tax year, the assessment becomes final and binding on the authorities and the taxpayer after the expiration of the tax year.

5. **Same; State Commission; Power.**—Notwithstanding the right of general and complete supervision is given to the State Tax Commission by § 2223, Code 1907, yet in view of the provision of § 2260, Code 1907, and the other statutes, the power of the State Tax Commission to set aside valuations and assessments must be exercised before the end of the current tax year.

6. **Same; Escaped; When Payable.**—After an escaped assessment is made it becomes due and payable and enforceable as other taxes, except that a 10% penalty is added by § 2266, Code 1907.

APPEAL from Jefferson Circuit Court.

Heard before Hon. C. B. SMITH.

Action by the State of Alabama against the Doster-Northington Drug Company, relative to certain escaped taxes. From a decree sustaining demurrer to the complaint filed, the State appeals. Affirmed.

WM. L. MARTIN, Attorney General, and J. P. MUDD, Assistant Attorney General, for the State. E. J. SMYER, and CHARLES E. RICE, for appellee.

THOMAS, J.—The appellee, a corporation conducting its business in Jefferson county, Ala., was assessed by the county tax commissioner of said county on its escape solvent credits and credits of value, for the tax years running from October 1, 1908, to September 30, 1912, inclusive, to the amount of \$10,000, and for the year beginning October 1, 1913, to the amount of \$20,000.

This aggregate assessed value, for these years, of \$70,000, was fixed on August 5, 1914, in pursuance of the provisions of section 2260 of the Code of 1907, by the county tax commissioner, and was agreed to by the taxpayer, appellee; and said assessment was thereafter filed by the county tax commissioner with the tax collector of Jefferson county for collection.

On November 3, 1914, the state tax commission disregarded this assessment made and returned to the tax collector, and made a revaluation and reassessment of the same "solvent credits and credits of value" of appellee, for each of said years, fixing the

[State v. Doster-Northington Drug Co.]

escape value of each year at \$25,000. In pursuance of such reassessment the state tax commission issued notice to said appellee company to appear before said commission on December 1, 1914, to show cause why the assessment should not be enforced, as on the valuation so fixed by that body.

By its attorney the Doster-Northington Drug Company, on December 7, 1914, made a special appearance before the state tax commission, and moved for the dismissal of the cause on the ground that the tax year in which the assessment was made by the county tax commissioner had expired on the 30th day of September, 1914, that the assessment became final on October 1, 1914, and that the state tax commission had no jurisdiction, power, or authority, after the expiration of the tax year (on November 3, 1914), to set aside and hold for naught the assessment made by the county tax commissioner. On December 28, 1914, the state tax commission overruled appellee's motion, and entered an assessment against it of \$15,000 a year for each of said years, on its solvent credits and credits of value, making an aggregate valuation for said years of \$90,000.

Appellee thereupon filed bond and appealed to the circuit court of Jefferson county, where the state filed a complaint containing two counts, setting up the facts in substance as we have stated them. In the second count of the complaint, in addition to the stated facts, there were allegations on the part of the state, by which it sought to raise appellee's assessed value over the amount so assessed by the state tax commission, to the extent of \$5,000, or to the total sum of \$95,000 for the years in question, whereas the total assessed valuation by the state tax commission, for such period, was \$90,000.

Defendant demurred to each count of the complaint, and assigned as grounds, in substance, that the assessment made by the county tax commissioner became final on the 1st day of October, 1914, and that thereafter, and on November 3, 1914, the state tax commission had no jurisdiction or power to set aside the assessment made by the county tax commissioner, and reassess or revalue the property. The court sustained the demurrer. The state excepted, and takes this appeal.

(1) This court has held that the tax year commenced on October 1st and ended with September 30th.—*Frost v. State*, 153 Ala. 654, 45 South. 203; *Hooper v. State*, 141 Ala. 111, 37 South. 662. There are many statutes that fix this demarcation of the

[State v. Doster-Northington Drug Co.]

tax year. Taxes are declared to be due and payable on the 1st day of October of each year (Code, § 2091; Acts 1915, p. 392, § 8, page 399, § 18); and all property brought into the state after the first day of October, and before the assessor has completed his assessment, is subject to taxation, the same as if it had been held or owned in the state on the 1st day of October (Code, § 2092); the lien of state and county, for taxes, is fixed from and after the 1st day of October (Code, § 2093); and the tax assessments must commence on the 1st day of October in every year, (Code, § 2102). When the Constitution required the payment of poll tax for the year 1901, before February 1st, it referred to the tax year as fixed by the statute of 1900-01—this poll tax having become fixed on October 1, 1900, and due on October 1st, succeeding.—Const. § 178.

(2) If the state through its duly constituted officers has exercised the final power of assessment and valuation of property, the determination is in its nature judicial (*State Tax. Comm. v. Bailey, et al.*, 179 Ala. 620, 627, 60 South. 913; *Orr v. State*, 3 Idaho [Hasb.] 190, 28 Pac. 416); and unless impeached for fraud or lack of jurisdiction, or reviewed by appellate authority, it is final (*Anniston City Land Co. v. State*, 185 Ala. 482, 487, 64 South. 110; 37 Cyc. 1071).

(3) The authority to make the assessment for escaped taxes was expressly conferred on the county tax commissioner by section 2260 of the Code of 1907; and it was his duty to assess, for "any preceding year not more than five years before that time," and to forthwith deliver the assessment to the clerk of the court of county commissioners, or other court of like jurisdiction, for hearing the taxpayer, unless the taxpayer, upon being notified by the tax commissioner that he had made such assessment, agreed with the tax commissioner upon the same, and paid over to the collector of the county the amount of taxes and fees due by him.

(4) The power of the county tax commissioner having been duly exercised, and his findings concurred in by the taxpayer, the assessment became final after the expiration of the tax year. If the action of the county tax commissioner was final as to the taxpayer, it must of necessity have been of like binding force on the tax official.

The fact that the assessment was of escape properties for five years, would not differentiate it from any other assessment, or from an escape assessment for any one year in question. If

[State v. Doster-Northington Drug Co.]

the state tax commission had the jurisdiction and authority to set aside this assessment on November 3, 1914, it would have like authority, after the expiration of the tax year and before the payment of taxes on the given assessment to set aside any assessment made by a taxpayer during the preceding year. It could not be said with reason that such power was conferred on the state tax commission, as to all taxpayers who had not paid their taxes on October 1st, but not as to taxpayers who had paid their taxes on or before that date, or before the date of the attempted revaluation. If this were the rule, owners and purchasers of property would be subjected to inconvenience, uncertainty, and changing financial obligation, to the state and the county.

The reasonable construction of the power of assessment of taxes, and of the review thereof, should be to the end that a stable and uniform system prevail in the state; and so, when annulment or review is not sought within the period of the tax year, that matured assessments shall be binding alike on the tax-payer, and on the taxing authorities. Of course, it could not be maintained that a proper proceeding, begun within the tax year by the duly constituted authority, to assess, or cause to be assessed, or to set aside and hold for naught the assessment upon, a given valuation for taxation, may not be conducted and concluded beyond the expiration of the tax year; nor that escape taxes, coming to the knowledge of the taxing authority, may not be assessed, or resisted, beyond the period of any one tax year within the limitation of the statute.

The power of the state tax commission has been discussed by Chief Justice ANDERSON in *State Tax Commission v. Bailey, et al.*, 179 Ala. 620, 628, 629, 60 South. 913, 916, and in that case he expressly reserved the question now here for decision, by the use of this language: "As to whether or not an assessment may be set aside, after the 1st of October succeeding the expiration of the tax year, we need not decide, as the order of the commissioners' court, in the present instance, was set aside before the expiration of the tax year, and after this was done there was no existing assessment to become final upon the expiration of the said tax year. Nor did the setting aside of this order reinstate the assessment made by the tax assessor. * * * This board was created for the purpose of exercising a general superintendence and supervision over the assessment and collection of taxes throughout the entire state, and it was not contemplated that

[State v. Doster-Northington Drug Co.]

dereliction on the part of their subordinates would result only in a single county, or that the state commission could exercise its revisory powers in all the counties between the determination of the county commissioners and the 1st of the succeeding October; and, while it may be that said orders had to be set aside before the 1st of October, it is not required that the reassessment and revaluation by the state commission should be made before that date."

In the instant case, the valid assessment made by the county tax commissioner, and agreed upon, after notice, by the taxpayer and the commissioner, and returned to the tax collector of the county, and no action for review begun by the state tax commission, or by its authority, during the current tax year, constitute a state of facts that distinguishes this case from that of *State Tax Commission v. Bailey, et al., supra*.

(5) The two provisions of the statute (Code, §§ 2223, 2260), when considered with the whole system of taxation provided for the state, and with due regard for the property rights of the citizen, as well as for the right of the state to equalize the burdens of taxes and to provide its revenues, can only mean that the right of general and complete supervision given in section 2223 to the state tax commission must be reasonably exercised.

If section 2223 can be construed to confer authority on the state tax commission, at any time after the expiration of the tax year, to set aside and hold for naught any valuation of assessment of property made by the owner or any of the officers authorized by law to make assessments, it might become the source of great vexation, and of even oppression, to the taxpayer, and render uncertain property rights, and subject the taxpayer and his property to unreasonable and uncertain claims and tax liens.

A proper construction, therefore, of section 2223, in connection with section 2260 and with the general taxing system of the state, would require that this power "to set aside and hold for naught" tax valuations and assessments be exercised by the state tax commission before the end of the current tax year. This is in consonance with the holding in *State Tax Commission v. Bailey, et al., supra*.

(6) The assessments in question, made on August 5, 1914, grew out of the decision in *State of Alabama v. Alabama Fuel & Iron Co.*, 188 Ala. 487, 66 South. 169, L. R. A. 1915A, 185, holding solvent credits a subject of taxation. After the decision, and

[State, ex rel. Shoemaker v. Davison.]

before the expiration of the tax year, the state tax commission had the authority, and had ample time, to give to the several county tax commissioners needful instruction, in the premises, as to this class of escape assessments. Not having done so in this case, it had no authority, after the expiration of the tax year, *to begin proceedings* for annulment, for after an escape assessment is made, it in fact and in law, as any other assessment, becomes due and payable and enforceable, except only that 10 per cent. penalty is added thereto.—Code of 1907, § 2266.

The cause is affirmed.

Affirmed. All the Justices concur.

State, ex rel. Shoemaker v. Davison.

Mandamus.

(Decided March 25, 1916. Rehearing denied April 21, 1916.
71 South. 678.)

Elections; Registration; Time.—Under Acts 1915, p. 244, § 15, a qualified citizen must be registered as a voter between Nov. 15th and Jan. 5th following, and a registration after Jan. 5th is forbidden.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Mandamus by the State of Alabama on the relation of S. P. Shoemaker against R. P. Davison as County Registrar, to compel registration of a voter. From an order sustaining demurrer to petition petitioner appeals. Affirmed.

DOUGLASS & RAY, for appellant. BECKWITH & DAVISON, for appellee.

SOMERVILLE, J.—The appellant petitioner seeks by the writ of mandamus to compel the respondent, as registrar of Montgomery county, to register petitioner as a voter of said county. It appears that petitioner applied for registration on January 15, 1916, and was able to show that he was qualified for registration. The trial court sustained a demurrer to the petition, and the only question on this appeal is whether or not a

[State, ex rel. Shoemaker v. Davison.]

qualified citizen may be lawfully registered under the new registration law (Acts 1915, p. 239) after January 5th.

Section 15 of this act is as follows: "The registrar in each county shall visit each precinct except the precinct in which is located the county site, at least once, and oftener if necessary, between November 15, 1915, and January 1, 1916, and each two years thereafter, and shall remain there at least one day from eight a. m. until sunset, and shall sit at the court house at the county site from January 1, 1916, to January 5, 1916, to make a complete registration of all persons entitled to register. They shall give at least twenty days' notice of the time when and the place and the precinct where they will attend to register applicants for registration by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice, or to attend any appointment made by them in any precinct, they shall, after like notice, file new appointments therein; but the time consumed by the board in completing such registration shall not exceed forty working days in any county except that in counties having more than 50,000 population, as shown by the last preceding census, the time shall not exceed sixty days."

In prescribing the calendar time within which registration must be made, viz., between November 15th and January 5th, the language of the act is free from the slightest ambiguity. It is contended, however, that the limitation referred to is in effect qualified by the last clause of section 15, viz.: "But the time consumed by the board in completing such registration shall not exceed forty working days in any county, except that in counties having more than 50,000 population, as shown by the last preceding census, the time shall not exceed sixty days."

The question, therefore, is whether a clear and specific limitation within a calendar period which could include, for the recent registration session, only 43 or 44 working days, is to be extended by implication beyond the calendar limitation in counties having more than 50,000 population, which includes Montgomery county, by reason of a further limitation in such counties to 60 days for the work of registration. In short, does the declaration that the work of registration shall not consume more than 60 days authorize or require the registrar to make registrations beyond the calendar date expressly fixed for the termination of his labors?

[State, ex rel. Newton v. Herring.]

We think not. Indeed, the 40 and 60 days' limitations were evidently incorporated into the act by an adoption verbatim of the language of section 305 of the Code of 1907, under the provisions of which, without these limitations, the board of registrars could have consumed three months between July 1st and October 1st. Under the provisions of the new law, the 60 days' limitation was inapt and unnecessary, and its presence is clearly the result of carelessness or inadvertence. In the reconstruction of new systems of law out of existing statutes, such instances of verbal inaptitude are of frequent occurrence, and in the new registration act no effort seems to have been made to adjust or adapt the language of the many sections of the old law which are therein incorporated verbatim. A flagrant example of this will be found in section 24 (identical with § 314 of Code of 1907), which provides that "the action of a majority of the registrars shall be the action of the board, and a majority of the board shall constitute a quorum for the transaction of all business," although the new act substitutes a single registrar for the former board of three. Similar inaccuracies are numerous.

We cannot doubt that the intention of the Legislature was accurately expressed in the provision that all registration shall be performed between November 15th and January 5th; and this language, of its own force, forbids registration after the latter date.

It results that petitioner was not entitled to registration, and the demurrer to the petition was properly sustained.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

State, ex rel. Newton v. Herring.

Prohibition.

(Decided April 21, 1916. 71 South. 679.)

Elections; Registration; Time.—Qualified citizens can be lawfully registered only between Nov. 15th and Jan. 5th following, and citizens registered after that time are not lawful voters, and are not entitled to be placed upon the list as such.

[State, ex rel. Newton v. Herring.]

APPEAL from St. Clair Circuit Court.

Heard before Hon. JAMES E. BLACKWOOD.

Prohibition by the State, on the relation of J. H. Newton, against James L. Herring, as Judge of Probate, seeking to prohibit such judge of probate from placing upon the list of qualified voters of St. Clair county, the names of certain persons who were registered after the 5th of January. From a judgment denying the writ petitioner appeals. The cause is reversed and writ granted.

JOHN W. INZER, for appellant. JAMES A. EMBRY, for appellee.

THOMAS, J.—The appellant seeks by writ of prohibition to prevent the respondent, James L. Herring, as judge of probate of St. Clair county, Ala., from placing the names of Burrell Bowlin and others, so registered, on the official list of voters for said county. The averments of the petition are admitted to be true by said judge of probate. They are, in substance, that there was no qualified registrar for said county from November 1, 1915, to February 6, 1916; that prior to November 5, 1915, the Governor appointed one Hardee Cornett as registrar for said county, for the purpose of registering the qualified voters under the act of 1915 (Acts 1915, pp. 239-248); that Cornett did not qualify, nor enter upon the discharge of the duties of the office of registrar; that there was no registrar for said county, who had the right, and on whom rested the duty, to register the voters of said county, until after January 6, 1916. The petition further alleges that after January 6, 1916, the Governor appointed R. F. Ashley as registrar of said county, who qualified as such and entered upon the discharge of the duties of the office; that he gave the prescribed notice that he would visit certain precincts of said county during the month of March, 1916, for the purpose of registering persons entitled to be registered; that he did register, at Ashville, at the courthouse, on March 1, 1916, the said Burrell Bowlin, and others, who had not theretofore been registered but who were entitled to be registered as voters of said county.

Thus is raised by the petition the right of the said R. F. Ashley to register the said Burrell Bowlin and others, after January 5, 1916, in, to-wit, the month of March, 1916; and the right of

[State, ex rel. Newton v. Herring.]

Burrell Bowlin and others, so registered or sought to be registered, by the said R. F. Ashley, in 1916, after January 5th, contrary to the express provisions of the act, to be registered and listed among the legal voters of said county.

The act of 1915, in question, made it the duty of the Governor, the state auditor, and the commissioner of agriculture and industries, or of a majority of them, acting as a board of appointment, to appoint a "reputable and suitable person" who should be a qualified elector and resident of the county and who should not hold an elective office during the time, to conduct in each county the registration of the qualified voters therein, the term of such registrars to be for four years and until their successors are appointed.

By sections 3 and 31½ of the act it is provided as follows: "Sec. 3. *Vacancies of Registrars; How Filled.*—If one or more of the persons appointed on such board of registration shall refuse, neglect, or be unable to qualify or serve, or if a vacancy or vacancies occur in the membership of the registrar from any cause, the Governor, state auditor and commissioner of agriculture and industries, or a majority of them acting as a board of appointment, shall make other appointments to fill such board."

"Sec. 31½. That in case of sickness or other disability of the registrar, the registrar on the approval of the probate judge may appoint a deputy registrar to act in the place of the registrar pending his sickness or disability, provided, however, that in no case shall more than one salary be paid."

Thus there was made in the statute ample provision for timely appointment, to meet any failure in the office of registrar because of the refusal, neglect, or inability, of the registrar "to qualify or serve;" and thus it was provided for the registration, within the time prescribed, of those qualified under the act to be registered.

Section 31 of the act reads as follows: "Sec. 31. The registrar shall, each year, within two weeks after January 15, make a copy of the list of names registered, stating the residence of the persons registered by precincts, and where precincts have been subdivided into districts by districts or precincts, which copy, along with the registration lists must be returned to the office of the probate judge of the county. The judge of probate shall certify an alphabetical list to the secretary of state. The probate judge shall keep both the original list filed by the regis-

[State, ex rel. Newton v. Herring.]

trars and the alphabetical list made therefrom as records in the office of the probate judge of the county, and same shall be open to public inspection."

Section 14 of the act prescribed, among others, the following duties of the judge of probate: "Sec. 14. The judge of probate shall from the registration list heretofore and hereafter returned to his office, including those registered prior to January 1, 1903, and excluding those names stricken therefrom, as shown by the lists returned to him under section 12 above, make correct alphabetical lists of all the electors registered by precincts and by districts of precincts where precincts have been divided or subdivided, which list shall be certified by him officially to be a full and correct copy of the list of registered electors for each precinct, and where a precinct has been divided or subdivided, for each distinct of each precinct respectively, as the same appears from the returns of the registrar on file in his office. Said judge of probate shall after the first day of February, 1916, and of each year thereafter, compare such official list of registered electors with the poll tax lists which have been furnished him by the tax-collector, and shall ascertain from such comparison the names of such persons on the official lists of registered electors who have failed to pay any poll tax for which they are legally due, and by such comparison and other available information, said judge of probate shall make correct alphabetical lists of all of the qualified electors registered by precincts and of districts of precincts where precincts have been divided or subdivided, and who have paid all poll tax due. Said lists so made up shall be published by him in some newspaper with a general circulation in said county on or before the 15th day of April, 1916, and of each year thereafter, and together with said lists there shall also be published a certificate that said list constitutes the correct list of all qualified electors who will be entitled to vote in any elections held in said county from the time of said publication until the first day of May of the next succeeding year, and also a notice that any voter duly registered whose name has been inadvertently or through mistake omitted therefrom and who has paid all poll taxes due and who is legally entitled to vote shall have ten days from said publication to have his name entered upon said list of qualified voters. If within such ten days any voter shall reasonably satisfy said judge of probate by proper proof that his name should be added to such list, his name shall be added thereto. An alphabeti-

[State, ex rel. Newton v. Herring.]

cal list by districts and precincts of those so added within said ten days shall be prepared and published by said judge of probate in some newspaper with a general circulation in said county on or before the first day of May, 1916, and of each year thereafter. The alphabetical list of voters published by said judge of probate on or before the fifteenth day of April, together with the names added and published on or before the first day of May, shall be the official list of qualified voters in said county and for the districts and precincts therein for the next ensuing year, until a new list is published, and no person whose name does not thereon appear shall be allowed to vote nor shall he be allowed to vote except in the precinct, or if the precinct has been divided into districts in the district in which his name on said list appears unless such person complies with the qualifications prescribed by law for challenged voters."

Section 15 of the act has been construed in *State ex rel. Shoemaker v. R. P. Davison, as Registrar, etc., infra*, 71 South. 678. There this court said: "We cannot doubt that the intention of the Legislature was accurately expressed in the provision that all registration shall be performed between November 15th and January 5th; and this language of its own force, forbids registration after the latter date."

We adhere to the construction given section 15 of the act in the *Shoemaker Case*.

If therefore ample opportunity for those who were qualified to register in St. Clair county during the period from November 15, 1915, to January 5, 1916, was not afforded, it was through no fault of the statutes made and provided for such registration.

The judgment is reversed, and one is here rendered granting the relief prayed.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

[State, ex rel. Mims v. Bugg, et al.]

State, ex rel. Mims v. Bugg, et al.

Mandamus.

(Decided April 21, 1916. 71 South. 699.)

1. **Statutes; Title; Comprehensiveness.**—Acts 1915, p. 348, is not invalid as violative of § 45, Constitution 1901, since its purpose of abolishing some of the county treasurers is embraced within the comprehensive title, notwithstanding the act does not abolish all county treasurers.

2. **Counties; Officers.**—General Acts 1915, p. 348, abolishes the office of county treasurer in all counties of a population of 50,000 or less, and does not merely suspend the existence of the office of such county.

3. **Statutes; Special; Classification.**—A classification made in good faith, based on population as a separation of counties in which there shall be a county treasurer, from those in which the office was abolished, is a valid classification.

APPEAL from Monroe Law and Equity Court.

Heard before Hon. W. G. MCCORVEY.

Mandamus by the State on the relation of D. D. Mims against L. J. Bugg, as Chairman of the Democratic Executive Committee of Monroe County and others, to require petitioner's name to be placed upon the official ballot for the office of treasurer of the county. From a judgment denying the writ petitioner appeals. Affirmed.

GREGORY L. SMITH & SON, for appellant. BARNETT & BUGG, for appellee.

MCCLELLAN, J.—This is an application for a writ of mandamus to be addressed to the chairman of the Democratic executive committee of Monroe county and to the judge of probate of said county requiring them to receive and file relator's declaration that he is a candidate for nomination at the Democratic primary election to be held on May 9, 1916, to the office of county treasurer of Monroe county. The judge of the law and equity court of Monroe county, to whom the petition was addressed, denied the writs prayed for, and this appeal results. The single question presented for review is whether the title of the act approved September 15, 1915 (General Acts 1915, p. 348), is sufficient

[State, ex rel. Mims v. Bugg, et al.]

under section 45 of the Constitution, which, as here important, provides that: "Each law shall contain but one subject, which shall be clearly expressed in its title."

The title of the act is as follows: "To abolish the office of the county treasurer, and to require the county funds to be deposited in such incorporated national or state bank in the several counties, as the board of revenue or court of county commissioners may elect, and to provide for the custody of such funds, and to require all acts required of the treasurer to be performed by the president of the board of revenue or county commissioners."

The act's application is restricted to those counties of the state of Alabama having a population of 50,000 or less according to the last federal census or any subsequent census.

(1) Since the title of the act manifestly expresses the legislative purpose to abolish the offices of county treasurer, the point of the appellant's criticism of this act is, in substance, this: That the title manifests a purpose to abolish the office of county treasurer throughout the state; whereas the body of the act effects that purpose in only a part of the counties of the state. The effect of this contention is to say that the title is broader than the act. In these circumstances the point taken is ruled against the appellant by the case of *Griffin v. Drennen*, 145 Ala. 128, 40 South. 1016, a decision that has been subsequently accepted as authority on this point in *Sheffield Oil Co. v. Pool*, 169 Ala. 420, 53 South. 1027. It was said in the first-cited case, quoting from an early decision: "When the subject may be comprehended in the title, the act should be upheld."

The subject of this act is the abolition of the office of county treasurer; and the title is not misleading because of partial (upon classification) application to counties in the state. That the act in its body does not abolish that office in every county in Alabama does not subtract from the comprehensiveness of the title, which undoubtedly includes the subject with which the act undertakes to deal. The writs prayed for were correctly denied below; Monroe county not having the requisite population to exclude it from the operation of the act.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

[Ex Parte Hill.]

ON REHEARING.

MCCLELLAN, J.—(2, 3) If the act under consideration did not affect the abolition in January, 1917, of the office of county treasurer in all counties of the state which now have, or hereafter may have, populations of 50,000 or less, there would be basis for the contention that the act only operates to suspend the existence of the office of county treasurer in a county or counties having a population of 50,000 or less. Since the act, as noted in the title, expressly abolishes the office in all counties within the population class therein defined, the premise for the contention indicated is not present. The first section of the act provides “that the office of county treasurer is hereby abolished.” The last section of the act provides, after a general repealing clause, that it shall not apply to counties having a population of 50,000 or more according to the present or the future federal census. The two provisions of the act, when read in appropriate, necessary relation, establish this as the legislative intent: That the office is abolished (in January, 1917) in all counties having a population of 50,000 or less. The act cannot be read to any other effect. Population is a valid basis for a classification made in good faith. If, perchance, a county’s population now below should hereafter increase above 50,000, according to the federal census, a question of what law should have application thereto may arise; but that question would not be of a constitutional nature.

The application for rehearing is denied.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Ex Parte Hill.

Prohibition.

(Decided May 4, 1916. 71 South. 994.)

1. **Judges; Disqualification.**—Under Acts 1909, p. 263, the judge who appoints the court stenographer may personally hear and determine the charges as a basis for his removal, although sworn to by the judge himself.

2. **Court; Offices; Stenographer; Place of Service.**—Under Acts 1909, p. 263, the judge appointing the court stenographer has no right to assign him to serve in another circuit to which the judge is assigned to preside.

3. **Same; Removal; Place of Trial.**—Where the judge files charges against the stenographer of his circuit, he must try such charges at some

[Ex Parte Hill.]

appropriate place within that circuit, and cannot try them in another circuit to which he has been assigned to preside.

ORIGINAL petition in the Supreme Court.

Petition by Charles F. Hill for prohibition to the Honorable James E. Blackwood, Judge of the Sixteenth Judicial Circuit, restraining him from trying charges against the petitioner as official stenographer. Writ granted in part.

The petition shows the following: Petitioner was appointed as official stenographer for said court by Judge Blackwood in 1911, under the act approved August 26, 1909 (Acts 1909, p. 263). Judge Blackwood was ordered by the Chief Justice of the Supreme Court to preside in the circuit court of Jefferson county, the Tenth judicial circuit, for eight weeks beginning January 3, 1916, and he forthwith ordered petitioner to appear at said time and place, to-wit, Monday, January 3, 1916, at 10 o'clock a. m., in the Lyon-Terry Building, and take up his duties as official court reporter for his circuit. Petitioner declined to serve as reporter in Jefferson county in compliance with said order, and after some correspondence between him and said judge the judge filed written charges under his own oath in the offices of the circuit clerk both of Jefferson and of Blount counties, the latter being in the Sixteenth circuit, and notified petitioner to appear and defend same, if he chose to do so, in the Lyon-Terry Building in Birmingham on January 10, 1916. The charges filed are that petitioner failed and refused to serve as reporter in Birmingham, as ordered by the judge, and that he has been guilty of misconduct in office and about and pertaining to the duties of his office. In his answer to the rule the judge admits the facts alleged in the petition, but affirms the duty of petitioner to serve as directed by him, and affirms his own power and duty as judge to pass upon the charges made by himself as affiant. He affirms also his power to hear and determine the proceedings in Birmingham, though he avers that he would not have heard it outside of the Sixteenth circuit against petitioner's objection.

C. C. NESMITH, and LUKE P. HUNT, for appellant. J. E. BLACKWOOD, pro se.

SOMERVILLE, J.—Section 1 of the act approved August 26, 1909 (Sp. Sess. Acts 1909, p. 263) provides for the appointment of trial court stenographers by the judges thereof, and declares:

[Ex Parte Hill.]

"Said stenographer shall be an officer of the court and shall hold office for the term of the judge appointing him; provided, that the judge of said court shall, at any time, have power to remove such official stenographer upon proper charges filed in writing and entered of record duly sworn to, for incompetency, neglect of duty, insubordination, or misconduct, if, after hearing such charges and such proof as may be offered in support thereof and against the same, it shall appear that such charges are well founded and satisfactorily proven."

(1) A proceeding under this act for the removal of a court stenographer is somewhat analogous to a proceeding for contempt, and we think that, whether it is instigated by the judge or not, it was intended that he should personally hear and determine the case, and that the ordinary rule of disqualification does not apply. It is unnecessary to elaborate the reasons for this conclusion, since, by amendment of the act, court stenographers are now removable at the discretion of the judges who appoint them.—Sess. Acts 1915, p. 859.

(2) Section 4 of the act referred to prescribes the territory within which a court stenographer shall serve, and this is very clearly the circuit for which he is appointed. He is an officer of the circuit court, and not an attache of the judge, and we can discover no authority for his assignment to work outside of his proper circuit. It follows that the requisition made upon petitioner by the respondent judge was disobeyed without any breach of official duty.

We shall, of course, presume that, if petitioner has not otherwise given any cause for his just removal from office, the learned respondent judge will dismiss the proceeding in accordance with the views above expressed.

(3) We are of the opinion, however, that, since respondent can conduct this proceeding only as judge of the Sixteenth judicial circuit, he must necessarily do so at some appropriate place within the circuit, and not elsewhere.

It results that the prayer to restrain respondent from hearing and determining the removal charges against petitioner will be denied; but the prayer to perpetually restrain respondent from hearing the cause outside of the Sixteenth judicial circuit will be granted, and the proper writ to that end will forthwith issue.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

[Bell, et al. v. Bell, et al.]

Bell, et al. v. Bell, et al.

Probate Proceedings.

(Decided February 3, 1916. Rehearing denied March 30, 1916.
71 South. 465.)

1. **Marriage; Presumption; Burden of Proof.**—Where a woman sought to show that her marriage relations with one man were void because of an alleged slave marriage with another, in view of the slave marriage law, the burden of proof to overcome the presumption of validity of the later marriage was heavy upon her.

2. **Same; Legalizing.**—The constitutional ordinances of September, 1865, legalizing marriages of freed men and women then living together as man and wife, contracted during slavery, did not legalize wrongful cohabitation, nor make marriage contracts for parties not intended by them.

3. **Appeal and Error; Dictum.**—Where the court held that a new trial should have been granted on the ground of newly discovered evidence, it was not necessary to decide as to the sufficiency of the evidence, to support the finding of the jury, and any decision thereon was dictum.

4. **Same; Review; Scope; New Trial.**—Where the appeal was from the denial of a new trial by the probate court, the circuit or Supreme Court may consider affidavits presented to the probate court on the motion for a new trial, but only for the purpose of determining whether the new trial should be granted, and not for their evidentiary weight.

5. **Same; Finding of Court.**—Where an issue is tried without a jury by the court on testimony ore tenus, the finding will not be reversed unless so manifestly against the evidence that a judge at nisi prius would set aside a verdict of the jury on the same testimony.

APPEAL from Jefferson Probate Court.

Heard before Hon. J. P. STILES.

Contest between Cornelia Bell and another, against Mary Bell, and others, over the proper disposition of an estate. Judgment for plaintiffs and defendants appeal. Reversed and remand with directions.

BONDURANT & SMITH, for appellant. **E. F. RAY**, and **DAVID F. ANDERSON**, for appellee.

SAYRE, J.—This is the second appeal in this case. See *Bell v. Bell*, 183 Ala. 645, 62 South. 833, where a discussion of the evidence as it then appeared may be found in the dissenting opinion of **DE GRAFFENRIED, J.**

[Bell, et al. v. Bell, et al.]

(1, 2) There is no reason to doubt that appellee George Bell is the natural son of Jim Bell, deceased, by the other appellee, Cornelia Bell, as now for the purpose of this case she calls herself; nor is there any need to deny that Jim, in a general way, recognized and treated George as his son. But in view of well-known conditions obtaining among negroes in the Southern States before and for some time after the conclusion of the War between the States, these facts can be of little consequence in the settlement of the issue disputed between the parties, viz., whether there was a slave marriage between Jim and Cornelia, recognized by them as an existing status on September 29, 1865. Several children were born to this couple. Of them appellee George was the eldest, and Cornelia at one place in her testimony—though this, it is conceded, is not in accord with the general drift of her deposition—fixes the date of his birth, according to the best of her recollection, at about a year after the marriage she claims to have contracted with Jim and about two years after the soldiers came back from the War. It is not disputed that a marriage between Cornelia Bell and Albert Jackson was solemnized under a license and in due form 25 years before this controversy arose, since which time she has lived with Jackson continuously as his wife, bearing to him six children; that before her marriage to Jackson she had intermarried with Nathan Oliver and had borne to him two—some of the witnesses say four—children; that Jim Bell, the distribution of whose estate is the matter in dispute, and Mary, one of the appellants, were married under a license according to the solemn form of law in 1875, more than 35 years before Jim's death in 1910, during which time they lived together as man and wife, children being born to them; and that during all this long time no question was raised as to the lawfulness of the relations assumed by these parties until the estate of Jim Bell came on for settlement and distribution. It is not necessary to deny that Jim and Cornelia cohabited in slave times in a manner somewhat like man and wife, though even this may appear to be doubtful when the approximate date fixed for the birth of George, and evidence tending to show Cornelia was of loose habits and had children before she settled down between the cold sheets of matrimony, are considered in connection with the common knowledge that sex relations lacked restraint, and births without semblance of wedlock were frequent, among slaves who knew or could do no better and had not learned the practical art of race suicide.

[Bell, et al. v. Bell, et al.]

But however that may have been, considering the undisputed facts and the consequences to the innocent parties to these formal marriages and their offspring, appellees assumed a very heavy burden of proof when they undertook to show that the relations in which these parties have lived so long were bigamous by reason of the fact that Jim Bell and Cornelia Jackson had contracted a slave marriage and were living together, recognizing each other as man and wife (*Washington v. Washington*, 69 Ala. 281), on the 29th of September, 1865, the date of the Constitutional Ordinance, which by no means legitimized illicit relations nor imposed upon parties the burdens of contracts they had not intended to assume, but only ratified prior slave marriages between freedmen and freedwomen then living together in mutual recognition of each other as man and wife (*Moore v. Heineke*, 119 Ala. 627, 24 South. 374; *Weatherford v. Weatherford*, 20 Ala. 548, 56 Am. Dec. 206).

The evidence contained in the record before us, differing, as we think, in some material respects from that appearing upon the former appeal, has had due consideration by the entire court. Without commenting upon it more circumstantially, our judgment is that the testimony for appellees, not to consider that offered in contradiction by appellants, does not suffice to overcome the strong presumption with which the law surrounds the undisputed formal marriages between these two couples and in virtue of which they have lived together as men and wives so long that the law will exercise extreme caution in disturbing the veil that time has drawn over their ancient relations to found a decree and a new status of social relations and property rights on the frail memory or recently stimulated imagination of ignorant witnesses, who for the lifetime of a generation have never had occasion to give the matter a thought. Upon this conclusion, the decree of the probate court will be reversed, and the case remanded, with direction that a decree be entered distributing the estate of Jim Bell, deceased, among appellants as his surviving widow and child, to the exclusion of appellees.

Reversed and remanded.

All the Justices concur, except GARDNER, J., not sitting.

IN RESPONSE TO APPLICATION FOR REHEARING.

SAYRE, J.—Counsel for appellant insist that the holding on this appeal is diametrically opposed to the ruling and opinion of

[Bell, et al. v. Bell, et al.]

the majority on the former appeal reported in 183 Ala. 645, 62 South. 833.

(3) On the face of the reports of the two appeals this contention would appear to be true; and we therefore deem it proper, if not necessary, to explain the holding in the two cases and the opinion of the majority on the former appeal.

In the first place, what was said in the opinion of the majority as to the sufficiency of the evidence before the probate judge to support his finding was dictum, for the reason that we held that he should have granted a motion for a new trial on the ground of newly discovered evidence. It was therefore unnecessary to decide as to the correctness of the judgment which we held should have been set aside, and which was set aside, and a new trial ordered. The appeals are materially different; the former appeal to this court was not from the probate court, as was this appeal, but was from the circuit court. We were there reviewing the judgment of the circuit court, and not that of the probate court.

(4) The holding on the first appeal was necessarily a holding to the effect that, if the evidence on another trial should be the same in effect as that indicated by the affidavits for a new trial, the judgment of the probate court should and would be different. Neither the circuit court nor this court could consider the affidavits, except for the purpose of saying whether or not the probate court should have awarded a new trial. These affidavits were not before the probate judge when he rendered his first decree declaring George Bell and Cornelia Jackson the lawful heirs of Jim Bell. The affidavits first appeared in the probate court in support of a motion to set aside the judgment theretofore rendered. For that reason the circuit court could not or should not have considered them except to review the action of the probate court in awarding a new trial.

On this appeal, however, the substance of these affidavits, which are numerous and extensive, was put in evidence before the probate court; and he considered them, or should have considered them, in rendering the decree appealed from. Hence the evidence is materially different, both in kind and in quantity, from that adduced in support of the final decree rendered by the probate court, which this court, on the former appeal, ordered to be set aside, and which was accordingly set aside, and a new trial awarded.

[Martin v. Walker, et al.]

(5) This court still adheres to the correctness and soundness of the rule announced in *Nooe's Case*, 70 Ala. 446, and which was quoted and followed on the former appeal, to the effect that: "When the law authorizes the disputed question to be tried, and it is tried, by the court without a jury, on testimony given viva voce in the presence of the court, * * * the rule is, not to reverse the finding, unless it is so manifestly against the evidence that a judge at nisi prius would set aside the verdict of a jury, rendered on the same testimony."

We now recognize and follow that rule, after a careful examination of the evidence as shown by the record on this appeal, which, as we have shown above, is very different from that on the first appeal, except that which appeared only in support of the motion for a new trial, and which we then held was sufficient to entitle these appellees to a new trial. The holdings of the majority, in the two cases, are not therefore inconsistent, though the results are entirely different owing to the fact that the evidence before the probate court, on the two trials, was materially different. In other words, if the evidence on this appeal were not different from that on the other appeal, we are not prepared to say that the result would be different. It is therefore the difference between the evidence on the two trials which leads the majority to a different result from that attained on the first appeal.

Martin v. Walker, et al.

Statutory Penalty:

(Decided April 6, 1916. 71 South: 667.)

1. **Appeal and Error; Harmless Error; Pleading.**—The refusal of the trial court to sustain a demurrer to a plea, subject to the demurrer, was harmless where there was a similar plea good as against demurrer, under which the same evidence was admissible, as under the plea retained.

2. **Mortgages; Satisfying of Record; Excuse.**—Mere inadvertence or indifference of a mortgagee after payment, and notice to satisfy would not excuse his failure to enter satisfaction on the record.

3. **Same.**—Under the facts in this case it is held that as the mortgagees were warranted in assuming that the mortgagor actually desired that the mortgage be satisfied of record, the mortgagor by accepting the power of

[Martin v. Walker, et al.]

attorney authorizing the satisfaction and failing to object, acquiesced therein, and could not complain that the mortgagees failed to enter satisfaction themselves, and hence, were not entitled to recover the penalty for failure to enter satisfaction.

APPEAL from Clay County Court.

Heard before Hon. E. J. GARRISON.

Action by H. E. Martin against W. R. Walker and George Gosdin, as partners, for the penalty for the failure to satisfy the record of a mortgage. Judgment for defendants, and plaintiff appeals. Transferred from the Court of Appeals under section 6, Acts of 1911, p. 450. Affirmed.

The notice is as follows: "Goodwater, Ala., 2-18-15. Dear Sirs: I see your mortgage on me hasn't been taken off record yet, please give the matter prompt attention and take it off at once. The mortgage was due Nov. 1, 1914, recorded in Mortgage Record 42, page 292, at Ashland, Ala. Yours very truly, H. E. Martin."

Upon this paper was also indorsed the following: "Judge Ingram: Please mark H. E. Martin's notes satisfied in favor of Walker & Gosdin, all of them. Walker & Gosdin."

It appears from the evidence that the original notice was delivered to Gosdin by one Percy Peppers and Estes Peppers, plaintiff's agents, and that, when the indorsement was made upon the notice, it and the notice were redelivered to the said Peppers with the request to deliver to plaintiff. The other facts sufficiently appear.

C. W. ALLEN, and MERRILL & CORNELIUS, for appellant. RID-
DLE, BURT & RIDDLE, for appellee.

SAYRE, J.—It may be doubted that the notice in this case was the full equivalent of the request in writing which the statute, section 4898 of the Code, makes a condition precedent to the mortgagee's liability for failing to enter the fact of payment or satisfaction on the margin of the record.—*Clark v. Wright*, 123 Ala. 594, 26 South. 501. But defendants knew what it meant, and accepted it as the request prescribed by law. We shall therefore, for the purposes of this case, consider it as sufficient. So considering the request, we think there was no reversible error.

(1) The ethical correctness of the decision below is plain, and our judgment is that it should be sustained on legal considerations as well. The facts to which plaintiff objected were admis-

[Martin v. Walker, et al.]

sible in proof of the allegations of pleas 6 and 7 alike. Plea 7 repeats the allegations of plea 6, and adds, to state the legal effect of the addition, that plaintiff, well knowing that defendants relied on him to deliver their request and power of attorney to the probate judge, and fraudulently contriving to lull defendants into a sense of security, to the end that the mortgage might not be marked satisfied, as plaintiff pretended to desire, but that it might not be so marked in order that he might have the penalty for failure, withheld the said request and power of attorney from the probate judge. This was a good plea, as for any specific objection taken to it by the demurrer, and the judge below, trying the case without a jury, could not have reasonably found otherwise than that it was sustained by the proof. Such being the case, the survival in the record of plea 6, though it should have been stricken on demurrer, will not be allowed to work a reversal of the judgment.

(2, 3) The only point of apparent difficulty is raised by plaintiff's proposition that he owed defendants no duty to take their request and power of attorney to the probate judge, and hence they had no right to rely upon him to do so. In the peculiar circumstances of this case our opinion is that defendants had both a moral and legal right to rely upon plaintiff as alleged.

Without dispute the evidence showed that defendants, upon receiving from plaintiff's agent the request in writing that the mortgage be marked satisfied upon the record, indorsed upon it a written request and authority to the probate judge to mark the note satisfied—meaning upon fair construction the note and mortgage in the body of which it was incorporated; that they delivered this request and power of attorney to plaintiff's agent, who thereupon became their agent, with the request, in effect, that he or plaintiff would take it to the probate judge upon some occasion when they would be going to the county seat, where the mortgage was recorded; that this agent did not indicate that he would take the paper to the probate judge, but he did undertake to carry it to plaintiff; that he delivered the paper to plaintiff and told him of defendants' request; that plaintiff said nothing; did nothing. The mortgage in question, a mortgage securing a loan of \$265 on household furniture, farming stock and implements, and crops to be grown by the mortgagor, was executed at Goodwater, in Coosa county, and defendants' request and power of attorney was dated from Goodwater. But the mortgage was

[Martin v. Walker, et al.]

recorded in Clay county, and this suit was brought in Clay. The fair inference is that plaintiff lived in Clay, and that defendants did business at Goodwater. These facts, to which we have last referred, are significant to this extent; they go to prove, there being nothing to the contrary, that defendants were not making an extraordinary or unreasonable draft on the good feeling upon which, as the whole record of the facts goes to show, they relied in assuming that plaintiff in good faith desired that the cloud upon his title should be removed, within two months at most, and in sending their request to him. The true motive that characterized plaintiff's conduct in the premises is further shown by the fact that within the time in which the record might have been satisfied according to the statute he went to the county seat, and on the sixtieth day, which was the first day after two months had expired, he went into the probate office with the power of attorney in his pocket, but withheld it from the probate judge. The mortgage was satisfied of record, but it does not appear just when this was done; we know only that it was more than 60 days after notice. These facts authorized and required a judgment for defendants under their seventh plea.

The mere inadvertence or indifference of the mortgagee after payment and notice will not excuse his failure to enter payment or satisfaction of record.—*Dittman Boot & Shoe Co. v. Mixon*, 120 Ala. 206, 24 South. 847. In ordinary transactions concerning property, where the parties have adverse interests and deal at arm's length, it is the duty of every one to exercise reasonable care and prudence for his self-protection, and if he negligently trusts himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has placed himself by his own imprudent confidence. Many cases illustrate this doctrine.—*Terry v. Mutual Life Ins. Co.*, 116 Ala. 242, 22 South. 532; *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355; 2 Cooley on Torts (3d Ed.) 931, note. Hence mere silence, or inaction, in the absence of some duty to speak, or act, is no fraud. On the other hand, the statute on which plaintiff predicated his action was not made to be an instrument of fraud.—*Chattanooga Co. v. Echols*, 125 Ala. 548, 27 South. 975. It is highly penal, and must be strictly construed.—*Mayhall v. Woodall*, 192 Ala. 134, 68 South. 322. Fraud may consist in producing a false impression upon the mind of another, and, if this result is accomplished, the method adopted by the artful mind is not a matter of importance.

[Martin v. Walker, et al.]

"So one may accomplish a fraud by encouraging and taking advantage of a delusion known to exist in the mind of another, though nothing is directly asserted which is calculated to keep it up."—Cooley, 910, 911.

In the law of estoppel quiescence under such circumstances as that assent may be reasonably inferred from it is the equivalent of acquiescence.—Herman on Estoppel, 776. Quiescence may amount to misrepresentation. It has been said, however, that fraud or bad faith is a necessary ingredient of misrepresentation by passivity (16 Cyc. 730), and, so far as this case is concerned, we think that is the correct rule.

Passing on the law and the facts, as did the court below, we affirm two things:

(1) That defendants were not guilty of culpable negligence in relying on plaintiff to take their power of attorney to the judge of probate. Negligence is determined by reference to the standard of care ordinarily exercised by prudent men in like circumstances. Plaintiff's request that the record of the mortgage be marked satisfied was notice to defendants that the penalty might follow upon their failure to comply within the time limited by the statute; but they may very well have been, and doubtless were, under the impression—delusion it may be termed—that what plaintiff really desired was that the record should be satisfied. Plaintiff made no express promise; but defendants promptly and without demur conceded by their action that the mortgage debt had been paid, and that plaintiff was entitled to have what he asked. No reason appears why they should have understood that plaintiff was dealing with the subject in hand as a matter of difference or antagonism between them. They had no interest in keeping the record of the mortgage unsatisfied. Their interest, like that they supposed the plaintiff had, was that the record should show satisfaction. Their request that plaintiff take the power of attorney to the probate judge, proceeding, as evidently it did, upon their assumption of a state of good will between themselves and plaintiff and upon the further assumption that plaintiff really desired that for which he asked in his notice, which took the guise of an informal and not unfriendly request, in connection with plaintiff's receipt and retention of it in silence, when dissent would have been so easy, natural, and reasonable according to the common standard of good neighborhood and good faith prevailing in ordinary intercourse between

[Martin v. Walker, et al.]

men dealing with a matter in which they have a common interest, raised the implication of a promise on his part.

(2) We do not mean to assert that by anything he did plaintiff forfeited his right to have the record of the mortgage marked satisfied. The bad faith of which defendants complained could in no event suffice to deprive him of that right. But plaintiff's conduct was urged by way of defense and in support of an existing status of property which had its origin in undisputed right, and in that aspect it was of controlling legal importance and consequence. The outcome of the case depended, not upon any inquiry as to previously existing property rights, but upon the question whether defendants' liability under the statute had been nurtured to maturity by any fraudulent means. Defendants had no legal right to impose any duty upon plaintiff; but from the circumstances in evidence the court must have been reasonably satisfied that defendants did, not unreasonably as such things go among men acting in good faith, rely upon plaintiff to take their request and power of attorney to the probate judge, and that he knew they were relying upon him. From this situation arose the duty, not indeed to take the paper to the probate judge, but, if plaintiff would not, to disabuse the mind of defendants of the delusion under which they labored, as he might so easily have done. Ordinarily the fact that a promise is never performed is not of itself either fraud or evidence of fraud. Nevertheless a promise is sometimes the very device resorted to for the purpose of accomplishing fraud, and the most apt and effectual means to that end.—Cooley, p. 929. The fraud in such case is not the failure to keep the promise, but it is that a promise, purporting to be made for ordinary business reasons, or from good will, is in fact made as a device to lure the promisee into a liability which he would otherwise have avoided.—*Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406. The most rational conclusion in this case was that plaintiff, allowing defendants to rest in the belief that he desired to have the record satisfied, when in fact he desired that it be not satisfied in order that he might have the penalty, allowing them to rely upon the false security of a confidence to the misplacement of which he had contributed by his silence when in good faith he should have spoken, took advantage of the situation, and evidently that was his purpose all along—to lay the trap into which they fell. The right to the penalty prescribed by statute should not be allowed to rest upon such ground, and so the seventh plea was established.

[Brown v. City of Tuscaloosa.]

Plaintiff cannot be heard to say that the probate judge might not have been willing to execute the power of attorney. That was not a matter for plaintiff's consideration. If the power of attorney, being delivered, had not been executed, or if plaintiff had not allowed defendants to rest on the belief that he would deliver, defendants would have been responsible for the consequences.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Brown v. City of Tuscaloosa.

Violating City Ordinance.

(Decided April 20, 1916. 71 South. 672.)

1. **Criminal Law; Former Jeopardy.**—To have been put in former jeopardy a defendant must have been put to trial for the same offense, or one of the same species of offense supportable by the same evidence, or else the one crime must have been an essential ingredient of the other; the mere improper introduction on the former trial of evidence not used to support the present charge does not constitute former jeopardy.

2. **Indictment and Information; Variance; Crime.**—A crime charged as of one date may be established by proof of its occurrence on another date, but the crime proved must antedate the charge on which a defendant is being tried, otherwise there is a fatal variance.

3. **Same; Evidence; Time.**—Where the prosecution is for crime, evidence of an offense committed by defendant later than the charge upon which defendant is being tried is inadmissible and will not support a conviction.

4. **Criminal Law; Former Jeopardy.**—A former acquittal is no bar to a subsequent prosecution unless defendant could have been convicted under the first indictment upon proof of the facts averred in the second.

5. **Same; Pleading.**—Where each of defendant's special pleas of former jeopardy averred that he had been formally put in jeopardy, and tried for the same offense now charged, he was not entitled to a discharge on the ground that though the pleas were insufficient in their averments of fact, yet the evidence sustained them as framed, and hence defendant was entitled to judgment.

APPEAL from Tuscaloosa County Court.

Heard before Hon. HENRY B. FOSTER.

Will Brown was convicted of violating a city ordinance, and he appeals. Affirmed.

[Brown v. City of Tuscaloosa.]

Defendant was convicted of violating a prohibition ordinance of the city of Tuscaloosa on a warrant issued by the recorder on May 21, 1914. He appealed to the county court, and was there tried on December 4, 1914, and convicted on the charge of doing prohibited acts "on or about May 21, 1914." On that trial he filed several special pleas setting up a former trial and acquittal on the same charges now presented. This issue was tried on an agreed statement of facts by the court without a jury, and found against the defendant. Thereupon, the general affirmative charge on the general issue being refused to the defendant, he was found guilty by the jury, and there was judgment accordingly. The facts offered in support of these special pleas so far as they are pertinent, are as follows: On March 24, 1914, defendant was arrested on a warrant by the recorder, charging violation of the prohibition ordinances of the city of Tuscaloosa prior to that date. He was convicted, and appealed to the county court. He was there tried on that charge on October 21, 1914, and was acquitted. On that trial the only evidence placed before the court, and which was not objected to, related to the offense committed by defendant on May 21, 1914, he having in his possession 51 half pints of whisky, and the court charged the jury that they must discharge the defendant, since the only offense proved occurred after March 21, 1914, the date of the issuance of the warrant. The errors assigned are to the finding of the court on the special pleas and the refusal of the affirmative charge.

WRIGHT & FITE, for appellant. BROWN & WARD, for appellee.

SOMERVILLE, J.—It is in effect conceded by counsel for defendant, and the record itself is conclusive of the fact, that the offense for which defendant was previously tried, and of which he was acquitted, was not the offense with which he is presently charged. It is, however, the conception of counsel that the mere introduction on the former trial of the evidence now used to support the present charge placed defendant in some danger of a conviction of this offense, however irrelevant the evidence, and however unauthorized and wrongful such a conviction would have been, and that such a danger was a legal jeopardy.

(1) This theory of former jeopardy is not only not tenable, but it scarcely merits serious discussion. To have been in former jeopardy a defendant must have been put upon trial for the same offense, or one of the same species, supportable by the same evi-

[Brown v. City of Tuscaloosa.]

dence; or else the one crime must be an essential ingredient of the other.

"If the evidence which is necessary to support the second indictment was admissible under the former, related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar."—12 Cyc. 280, b.

(2, 3) It is, of course, true that time is not ordinarily material, and that a crime charged as of one date may be established by proof of its occurrence on another date. But in every case the crime proved must antedate the charge upon which the defendant is being tried; otherwise, not only is there a fatal variance, but also a complete absence of jurisdiction of the particular offense. In such a case evidence of the later offense is not admissible, and there can be no lawful conviction thereof.

(4) Jeopardy implies an exposure to a lawful conviction of the same offense on a former trial, and not the mere danger, humanly speaking, that a jury may unlawfully try and convict the defendant of a distinct offense with which he is not charged before them, and which, as matter of law, cannot be embraced in nor covered by the charge actually presented. This principle is embodied in the rule long ago established in this state, as in many others, that:

"A former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted upon the first indictment upon proof of the facts averred in the second."—*Hall v. State*, 134 Ala. 90, 115, 32 South. 750; *Dominick v. State*, 40 Ala. 680, 91 Am. Dec. 496; *People v. McDaniels*, 137 Cal. 192, 69 Pac. 1006, 56 L. R. A. 578, 92 Am. St. Rep. 81, note page 105.

As stated by Mr. Freeman in the note referred to (92 Am. St. Rep. 107, c): "Under this test it is the facts which are alleged in the two indictments, and not the testimony given in either, by which the identity of the offenses is to be determined. Accordingly it is held immaterial that the evidence relied upon to support the second charge was, in fact, introduced on the trial of the first. The criterion is not what testimony was introduced, but what might have been, and the determinative feature is whether the facts alleged in one charge would support a conviction under the other."

In the case of *Martha v. State*, 26 Ala. 72, the defendant was tried for the arson of a dwelling house belonging to one Todd,

[Ryan, Treasurer, v. Collins.]

and pleaded that she had been formerly put upon trial for the arson of a dwelling house belonging to one Coleman, and that both indictments, and the proof offered under each, related to the same act of burning. The conclusion of this court on appeal was that: "As the offenses charged in the two indictments are distinct and different, the record showing the discontinuance of, or acquittal upon, the prosecution of the one, would be no bar to a prosecution of the other."

And it was further said that: "As the record showed the two indictments to be for different offenses, and as a record cannot be gainsaid by parol evidence, it was entirely proper for the court to charge the jury that the plea of autrefois acquit and discontinuance were not sustained by the proof."

(5) It is, however, insisted that, even though the pleas were insufficient in their averments of facts, yet the evidence sustained the pleas as framed, and hence defendant was entitled to a judgment thereon, and so to a discharge. This contention is not well founded; for each one of the special pleas distinctly avers that defendant has been formerly put in jeopardy, and has been tried for the same offense now charged.

These averments were not supported by any proof, and hence the technical rule invoked by defendant is not here available.

Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Ryan, Treasurer, v. Collins.

Mandamus.

(Decided April 13, 1916. 71 South. 690.)

1. **Fines; Disposition; Witness Fee.**—Under § 6664, Code 1907, a certificate for a witness fee, signed by the foreman of the grand jury, and endorsed by the clerk of the court showing that the state failed to convict in that case, shows that the owner of the certificate was entitled to payment by the treasurer of the county; the clerk's endorsement being in compliance with § 6666, Code 1907.

2. **Same.**—Under § 6888, Code 1907, the fines paid by persons convicted of misdemeanor became a part of the fine and forfeiture fund, and could be

[Ryan, Treasurer, v. Collins.]

devoted to paying fees of state witnesses, notwithstanding the provisions of Local Acts 1911, p. 91, and the contention of the treasurer that the fines paid by misdemeanor convicts should be devoted to the public roads.

APPEAL from Morgan County Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Application by F. M. Collins for mandamus to T. R. Ryan, as treasurer of Morgan county, to compel him to pay the amount due on a witness certificate. From a decree granting the writ, the treasurer appeals. Affirmed.

The following is the certificate directed to be set out:

Grand Jury Certificate.

The State of Alabama, Morgan County.

Jim Garth

The State v. Grand Jury. No. 777.

Law and Equity Court, Spring Term, 1912.

Having proved attendance as a witness before the grand jury at said term, one day and for miles traveling to and from court, is entitled therefor to _____

two _____ dollars.

2 days at \$1.00 per day, \$2.00

miles, at 5 cts., per mile, \$ none.

W. A. Boger, Foreman.

The above and foregoing certificate was certified as a claim or charge against the fine and forfeiture fund by the clerk of the Morgan county law and equity court, and was duly filed by T. R. Ryan, as county treasurer of Morgan county, Ala., as shown by the following indorsements appearing on the back thereof, to-wit:

The State of Alabama, Morgan County, Circuit Court.

The state failed to convict in this case.

A. S. Blackwell, Clerk.

1-18-13.

File No. 2694. Filed in my office Feb. 24, 1913.

T. R. Ryan, County Treasurer.

Paid No. _____

F. M. Collins.

SAMPLE & KILPATRICK, for appellant. W. H. LONG, JR., for appellee.

GARDNER, J.—By this proceeding petitioner (appellee here) seeks by mandamus to compel appellant, as treasurer of Morgan county, to pay the amount due on a witness certificate

[Ryan, Treasurer, v. Collins.]

issued to one Garth by the foreman of the grand jury of the law and equity court of Morgan county, and which certificate is owned by the petitioner. The certificate, with the indorsement of the clerk of the court thereon, is made an exhibit to the petition and will be set out in the report of the case.

(1) One of the assignments of demurrer takes the point that the petitioner shows no right for an order commanding respondent to pay the amount due, in that no facts are averred to show that it had been properly certified as required by law, so as to require its payment out of the fine and forfeiture fund of the county. The demurrer was overruled.

Section 6664 of the Code of 1907, which is but a codification of the act of December 7, 1896 (Acts 1896-97, p. 81), reads as follows: "The foreman of the grand jury shall issue certificates to all witnesses examined before the grand jury, and such certificates may become claims against the fine and forfeiture fund in the same manner as witnesses certificates issued to state witnesses by the clerk of the court."

The authorities relied upon by counsel for appellant (*Herr v. Seymour*, 76 Ala. 270) ; *Alston v. Yerby*, 108 Ala. 480, 18 South. 559; *Scruggs v. State*, 111 Ala. 60, 20 South. 642), were cases arising before the enactment of the above-cited statute. This statute was doubtless enacted to meet these decisions, and we think it quite clear that the certificate of the foreman of the grand jury was in full compliance with said section 6664 of the Code, and the indorsement thereon, as shown by the clerk, was a substantial compliance with section 6666, Code 1907, and that the demurrer was properly overruled.

(2) The next insistence to be considered is one involving the meritorious question on this appeal. The appellant contends that he had, as treasurer of Morgan county, the sum of \$2,000 paid to him by the clerk of the circuit court, which sum was the aggregate of numerous fines imposed against defendants convicted of misdemeanors; that these defendants were sentenced to work out the fines on the public roads of the county; and that after such fines were imposed the defendants, instead of performing said labor and in lieu thereof, paid the fines in money to the clerk. It further appears that by a local act approved March 11, 1911, all the county convicts of Morgan county are required to be worked on the public roads of that county, and the commissioners court is required to see that this is done. It is therefore the insistence of

[Ensley Motor Car Co. v. O'Rear, Treasurer.]

counsel for appellant that once the hard labor sentence is imposed the convict becomes subject to hard labor for the county on its public roads, and that, should he discharge this sentence of labor, no payment would be made or passed to the fine and forfeiture fund of the county. It is argued, therefore, that after he has once become subject to work the road, and then pays his fine, the money should go to the benefit of the public roads just as would his labor had the fine not been paid.

We cannot concur in this contention. All fines go to the county.—Code 1907, § 6888. It is conceded that, while the fine and forfeiture fund is a county fund, yet the manner of its disposition resides in the Legislature, and the commissioners' court has no control over it.—*Sanders v. Court County Com'rs*, 117 Ala. 543, 23 South. 788. The provisions of the Code above cited disclose that the Legislature has prescribed how this fund shall be disbursed. There is nothing in the local act above referred to which in any manner conflicts with any of the general provisions as to this fund.

It results that the judgment of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Ensley Motor Car Co. v. O'Rear, Treasurer.

Mandamus.

(Decided April 20, 1916. 71 South. 704.)

1. **Counties; Claims; Liability.**—No officer can charge a county with the payment of any claim due him, however meritorious, or whatever benefit the county may have derived therefrom, unless expressly or by necessary implication it is authorized by law; the policy of the state being to remove liability on any account except as it is expressed or implied by statute.

2. **Same.**—The power of the board of revenue, or court of county commissioners to expend the funds of the county, is not confined strictly to claims enumerated by statute.

3. **Same; Boards of Revenue; Discretion.**—In performing their duties under the statute in locating, erecting, repairing, removing or furnishing county buildings, bridges and roads, the commissioners or boards of revenue exercise a function that is quasi-legislative, and have a discretion that cannot

[Ensley Motor Car Co. v. O'Rear, Treasurer.]

be exercised for them by any other officer, or directed by any court except when their acts are fraudulent.

4. Same; Powers; Purchasing Automobile.—Under General Acts 1915, p. 573, §§ 1, 5 and 9, the commissioners court of a county has authority to purchase and maintain an automobile for use in maintaining and inspecting the roads and bridges of a county, and having issued a proper warrant therefor, such warrant should be duly registered and paid by the county treasurer as required by law.

APPEAL from Walker Law and Equity Court.

Heard before Hon. T. L. SOWELL.

Mandamus by the Ensley Motor Car Company against Caine O'Rear to compel him as County Treasurer to pay a warrant, ordered issued by the Court of County Commissioners. From a decree denying the writ petitioner appeals. Reversed and rendered.

BURGIN, JENKINS & BROWN, and FINCH & PENNINGTON, for appellant. LACY & LACY, for appellee.

THOMAS, J.—(1) This court has held that counties are governmental agencies of the state; and the board of revenue or commissioners' court is invested with large powers in the conduct of the business affairs of the county. The county is liable for those claims only which the law imposes or authorizes to be contracted.

"No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may have derived therefrom, unless expressly or by necessary implication authorized by law."

Without regard to any liability of the county at common law, the policy in this state is to remove liability on any account except as it is expressed or implied by statute.—*Mobile v. Drago*, 172 Ala. 155, 50 South. 995; *Naftel v. Montgomery Co.*, 127 Ala. 563, 29 South. 29; *Jack v. Moore*, 66 Ala. 184; *Simpson v. Lauderdale Co.*, 56 Ala. 64; *Posey v. Mobile Co.*, 50 Ala. 6; *Mitchell v. Tallapoosa Co.*, 30 Ala. 130; *Van Eppes v. Comm. Court*. 25 Ala. 460; *Barbour Co. v. Horn*, 48 Ala. 649; *Barbour Co. v. Brunson*, 36 Ala. 362; 2 Kent, 274.

(2) It must not be understood that the power of the board of revenue or court of county commissioners to expend funds is confined only to claims enumerated in the statute; nor can it be reasonably insisted that no other claims than such as are

[*Ensley Motor Car Co. v. O'Rear, Treasurer.*]

"enumerated" can be charged upon the county.—*Jack v. Moore, supra*; *Gunter, et al. v. Hackworth, et al.*, 182 Ala. 205, 62 South. 101; *Mobile v. Williams*, 180 Ala. 639, 61 South. 963; *B. E. L. & P. Co. v. City of Montgomery*, 114 Ala. 433, 21 South. 960; *Allen v. La Fayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497. In *Montgomery County v. Pruett*, 175 Ala. 391, 57 South. 823, it is made clear that no contract can be implied against a county unless it is one which the county is empowered by law to make. In *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 68 South. 971, the court said: "Incidental to the power to build roads, bridges, jails, hospitals, and courthouses is the implied power in the board or court to properly inform themselves and to protect the county by the employment of engineers and architects accustomed to such construction, that the needed facility may be the better constructed and adapted and the general public thus the better served.—*Smtih v. McCutchen*, 146 Ala. 455 [41 South. 619]."

(3) In the location, erection, repair, or removal, or in the furnishing of the county's buildings, bridges, and roads, the court of county commissioners or board of revenue have a discretion that cannot be exercised for them by any other county official, or directed by any court, except only when their acts are such as amount to fraud, corruption, or unfair dealing. In the performance of these statutory duties, boards of revenue and courts of county commissioners exercise a function that is quasi legislative.—*Matkins v. Marengo Co.*, 137 Ala. 155, 34 South. 171; *Board of Revenue of Covington Co. v. Merrill, supra*; *Talley v. Jackson Co.*, 175 Ala. 644, 39 South. 167; *Eutaw v. Coleman*, 189 Ala. 164, 66 South. 464; *Comm's Court v. Hearne*, 59 Ala. 371; *Askew v. Hale Co.*, 54 Ala. 639, 25 Am. Rep. 730; *Parnell v. Comm's Court*, 34 Ala. 278; *Comm's Court v. Bowie*, 34 Ala. 461; *Moore v. Hancock*, 11 Ala. 245. In *Town of Eutaw v. Coleman, supra*, this court said: "We are not dealing with any question of the advisability of what the commissioners have done. There is no charge of fraud, corruption, or unfair dealing, and, in the absence of some such charge, this court is committed to the doctrine that in no case involving the exercise of discretionary power by the court of county commissioners will their action be controlled by any judicial tribunal."

(4) The contention of appellant is that the authority to purchase an automobile and to maintain it is by implication given

[Ensley Motor Car Co. v. O'Rear, Treasurer.]

the commissioners court by the act of 1915.—Gen. Acts 1915. p. 573. Section 1 of said act is as follows: "That the courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state are invested with a general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old, roads, bridges and ferries of their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they are given legislative, judicial and executive powers, except as limited herein. Courts of county commissioners, boards of revenue or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public road, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years. Provided, however, that nothing in this act shall be construed to authorize the courts of county commissioners, boards of revenue, or other like governing bodies of the several counties to establish, promulgate or enforce any rules, regulations or laws which may be in conflict with a local or special law providing for the working, maintenance, change, discontinuance or improvement of the public roads, bridges or ferries of such county, now in force or which may hereafter be enacted."

The power of eminent domain is given in section 5; and by section 9 the convicts of any county or municipality may be used in such work under the direction of the court of county commissioners or board of revenue, either in the actual construction of roads, or in quarries, gravel pits, or any plant used for the production of road material. And for the purpose of maintenance there is conferred on such boards or courts the right to impose tolls upon owners of vehicles, with permission to establish, con-

[Ensley Motor Car Co. v. O'Rear, Treasurer.]

struct, and maintain any road, street, or bridge within the corporate limits of any municipality.—Sections 13, 13½.

It is thus apparent that the statute invested in courts of county commissioners or boards of revenue general superintendence over the roads and bridges of the respective counties, and that in the construction, maintenance and improvement of roads and bridges unlimited jurisdiction and power is given, except only as it may be limited by the local or special statutes of force in the county. Such courts or boards may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may by such courts or boards be deemed necessary or advisable, to build, construct, work, improve and maintain a good system of public roads, bridges and ferries in their respective counties.—Acts 1915, p. 573, § 1. This power is to be exercised by such courts or boards as deemed necessary or advisable for the public weal, and cannot be exercised for them, nor can their exercise thereof be restrained or reviewed, unless it has been in a fraudulent, corrupt, or unfair conduct of the business of the county.

With the more recent demands for better roads and more secure bridges and ferries in all sections of the country—in the rural or country districts, and often at points remote from the county site or market places, as well as in urban localities—greater engineering skill and improved machinery and facilities are necessary, in the construction and maintenance of these public agencies. If a board of revenue or court of county commissioners may employ skilled architects to make plans for county ferries, bridges, and buildings, it may provide for like superintendence and inspection. So also, if the necessary material, equipment, and labor, for the proper construction and maintenance of the public roads, bridges, and ferries may be purchased or engaged, and the services of a competent engineer or inspector are required to construct or supervise such public improvements, there can be no doubt of the right to contract therefor. And if the right exists to contract for this inspection and supervision, then the right to maintain, and to transport such inspectors from one portion of the county to another, in the discharge of this public service, cannot be doubted.

The demand for construction and maintenance, and for inspection, of necessity would vary in the different counties, depending upon the facilities for travel, the distances to be tra-

[Dunn v. Dean.]

versed, and the nature and extent of the improvement undertaken. And if any court of county commissioners or board of revenue, as the business agent of the county, should attempt to so contract for machinery, materials, skilled services, or labor, as to amount to a fraudulent, corrupt, or unfair dealing on its part, or as the custodian of such property of the county, should attempt to so misuse, or authorize the misuse of, such property of the county, as to constitute a diversion of the property or funds of the county use, a forum is open to restrain such fraudulent conduct, and the member or members of the board so abusing their trust would be liable to the county therefor.

The authority having been exercised in the purchase for the county of an automobile, for the purpose of constructing, maintaining, and inspecting the roads and bridges of Walker county, and a proper warrant having issued therefor, such warrant should be duly registered and paid by the county treasurer in the manner required by law.

The judgment of the lower court is reversed; and judgment is here rendered, awarding the writ of mandamus as prayed in the petition.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Dunn v. Dean.

Mandamus.

(Decided April 20, 1916. 71 South. 709.)

1. Statutes; Title; Sufficiency.—Local Acts 1915, p. 293, is not violative of § 45, Constitution 1901, declaring that each law shall contain but one subject which shall be clearly expressed in its title.

2. Same; Enactment; Local Laws; Notice.—The body of the bill embracing provisions of law operated during the year 1916, the words "next session" contained in the notice of publication must be construed as meaning "next sitting" instead of "next session," said notice appearing pending the recess of the legislature, and the publication, therefore, must be held sufficient under § 106, Constitution 1901.

3. Same.—As there was no general law providing for a similar body created by Local Acts 1915, p. 293, the law was not invalid as being upon a subject covered by a general law.

[Dunn v. Dean.]

4. Jury; Trial; Vacation of Officer.—The provisions of § 16, Local Acts 1915, p. 293, are invalid as violative of §§ 6 and 105, Constitution 1901.

5. Statutes; Partial Invalidity; Effect.—If the invalid section may be stricken from the Act, leaving a statute complete within itself, sensible and capable of being executed, the striking of the invalid section does not overthrow the entire act. This rule saves Local Acts 1915, p. 293, notwithstanding § 16 thereof is invalid.

6. Constitutional Law; Separating Powers; Blending.—The provisions of Local Acts 1915, p. 293, are not violative of §§ 32 and 43 of the Constitution of 1901.

7. Statutes; Local Laws; Validity.—As the Act only creates originally the districts for the purpose of defining the territory in which the electorate may vote for a member of the board resident of that district and assigns a member of the board to each of the districts, Local Acts 1915, p. 293, is not violative of §§ 29 and 104 of the Constitution of 1901.

8. Same.—As the compensation theretofore allowed the probate judge was for mere incidental services, and the act relieved him from the duties theretofore imposed upon him by law, Local Acts 1915, p. 293, was not invalid as violative of § 104, subdivision 24, Constitution 1901, since it merely withheld compensation allowed for services for duties that were dispensed with.

9. Same; Journal.—In determining whether an act was passed with all constitutional formalities, the courts can look only to the journals of the legislative houses.

10. Same; Validity.—Where the journal showed the introduction of Local Acts 1915, p. 293, and its reference to the standing committee on ways and means, and then recited the consideration and favorable report of the bill by the standing committee on mines and manufactures, it failed to show a compliance with § 62, Constitution 1901, and was consequently invalid.

APPEAL from Conecuh Circuit Court.

Heard before Hon. A. E. GAMBLE.

Mandamus by Henry W. Dunn against F. J. Dean as Judge of Probate, to compel respondent to receive relator's declaration, and place his name upon the ballot of his party to be voted for for the office of County Commissioner under the general law. From a judgment denying the writ relator appeals. Reversed and rendered on rehearing.

HAMILTON & STALLWORTH and D. M. POWELL, for appellant.
E. E. NEWTON, for appellee.

MCCLELLAN, J.—In an appropriate way the appellant sought to qualify as a candidate for the Democratic nomination, in the primaries to be held on the 9th day of May, 1916, for "county commissioner of Conecuh county." His declaration was refused receipt by the judge of probate; and this proceeding

[Dunn v. Dean.]

seeks the writ of mandamus to compel official action by that officer, to the end that appellant may have the ballot of his party on his aspiration. The judge of probate declined to receive appellant's declaration, for the reason that the office to the nomination for which he aspired had been abolished by a local act approved September 7, 1915 (Local Acts 1915, pp. 293-296). The appellant insists that the local act noted is unconstitutional and void, and is, hence, no valid obstacle to the action he sought the judge of probate to take in his declaration of candidacy for county commissioner. The circuit judge denied the petition for the writ, and this appeal is for a review of his ruling. The local act under consideration has this title: "To establish a board of revenue for Conecuh county, to provide for their election and prescribe their powers and duties, to divide the county of Conecuh into five districts, and abolish the court of county commissioners for Conecuh county."

Section 1 establishes a board of revenue for Conecuh county. Section 2 divides the county into five defined districts. Section 3 provides for the election, at the general election in 1916, of one member of the board for, and by the qualified electors in, each of the five districts, fixes the qualifications for incumbents, and apportions the terms so that three of the members first elected shall hold office for two years and two of them for four years, and thereafter that their successors shall be elected for terms of four years. Section 4 provides for regular and special sessions of the board. Section 5 requires the members of the board to elect a president thereof. Section 6 makes provision for filling vacancies on the board. Sections 7, 8, 9, 10, and 12 prescribe the authority, power, and jurisdiction conferred on the board. Section 11 provides for the signature of county warrants by the president of the board, and for other services by the presiding office, and prescribes that: "He shall receive a reasonable compensation not exceeding \$3.00 per day nor the amount of \$150.00 per annum."

Section 13 makes further provision for services by the president, and allows him "fifteen cents per one hundred words for recording the proceedings of the said board," and exacts that the recording be done within a fixed period after each meeting. Section 14 provides that, when acting judicially, the board is a court of record. Section 15 provides for the furnishing of information to the board by the clerks of courts in the county that

[Dunn v. Dean.]

will serve to acquaint the body with fines and forfeitures taken during the term by the courts and judgments entered during the terms for the use of the county. Section 16 requires the publication, quarterly, by the body of statements of the receipts and disbursements of county funds, and for the vacation of "their offices" if the board fails or refuses to publish the statements required, and for the filling by the Governor of the vacancies thus occasioned when the prescribed certificate of the fact is filed with the Governor. Section 17 provides for the compensation and mileage of members. Section 18 requires the body's sessions to be held at the county seat. Section 19 abolishes the commissioners' court of that county at the expiration of the terms of the present commissioners. Section 20 is the usual repealing clause.

(1) The several grounds on which appellant rests his contention that the local act is void will be indicated in the opinion. The sufficiency of the title before quoted, as for any supposed violation of section 45 of the Constitution, must be pronounced in view of the following authorities: *State v. Teasley*, 194 Ala. 574, 69 South. 723; *Thomas v. Gunter*, 170 Ala. 165, 54 South. 283; *Griffin v. Drennen*, 145 Ala. 128, 40 South. 1016; *Sheffield Co. v. Pool*, 169 Ala. 420, 53 South. 1027.

(2) The local act under review was published in June, 1915, in a newspaper in Conecuh county. The caption of the notice so published read: "*Notice of Local Law*. Notice is hereby given that at the next session of the Legislature of Alabama, the following bill, in substance, will be introduced."

The Legislature of 1915 convened in January, 1915, and later, but before the month of June, 1915, recessed until during July, 1915. Section 106 of the Constitution requires the publication of notice of intention to seek the enactment of a local law, its substance being set forth in the notice. It is urged against this local act that the use, in the published notice alone, of the words "next session of the Legislature of Alabama" denoted a purpose to move for the enactment of the substance of the local legislation set forth in the notice at the session of the Legislature to convene in January, 1919, that being, it is urged, the next session of the Legislature of the state. There is no sound basis for such an insistence. The whole publication must be considered in determining the intent thereof. It is manifest from the body of the proposed law as published that the intent of the movers for the proposed legislation embraced provisions of law operative during

[Dunn v. Dean.]

the year 1916, long previous to the convention of the Legislature in January, 1919. The words "next session" in the caption of the published notice are, in necessary relation to those words, only susceptible of this meaning: During "next sitting" of the Legislature after the prescription of section 106 as to the period of publication has been complied with.

(3) It is urged that this local act is void for that it violates these provisions of section 105 of the Constitution: "No special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law; * * * and the courts and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law. * * *"

By way of interpretation and construction of section 105 this court has made a number of pronouncements. In view of the objections made against this local law, based upon the quoted provisions of section 105 of the Constitution, it is desirable to bring together these expressions of this court defining the purpose and effect of this section of the Constitution. In *Sisk v. Cargile*, 138 Ala. 164, 171, 172, 35 South. 114, 116, it was said: "Section 104 of the Constitution prohibits the Legislature from passing a special or local law in any one of 31 specified instances. A local law, as here referred to, is defined, under another section—section 110—to be one which applies to any subdivision or subdivisions of the state, less than the whole, and a special or private law is one which applies to an individual, association, or corporation. There are an indefinite number of local, private, and special interests, impossible to be anticipated, and which the framers of the Constitution did not attempt to enumerate. They did provide by section 105, that 'No special, private or local law, except the law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state.' In this connection it may be stated that there is no general law in Alabama authorizing the levy of a tax for the payment of debts incurred for road purposes, and no relief can be had in the courts, since the levy of a tax is a legislative power. They also provided by section 109 that: 'The Legislature shall pass general laws under which local and private interests shall be provided for and protected.' When, however, the relief in this class of undefined local, special, and private interests is not provided for by general

[Dunn v. Dean.]

laws, and the Legislature has failed to pass such laws, there is nothing in the Constitution which is a limitation on the right of the Legislature to pass special, private, or local laws except in one of the 31 specified instances named in said section 104. In these instances, the Legislature must pass general statutes for relief, or none can be had, unless the same is already provided for by a general law. Section 109 was intended to impose a duty on the Legislature by the enactment of general laws to that end, to protect local, private, and special interests, but it is not, as in the 31 enumerated instances in section 104, a limitation on its power to pass special laws to this end. The power of the Legislature to pass laws of a private, local, or special interest was unlimited; and, outside or beyond these 31 specified instances, the Legislature has the same power it had before the adoption of the present Constitution, provided there is no general law under which relief is granted or may be had."

In *City Council v. Reese*, 149 Ala. 188, 190, 191, 43 South. 116, 117, it was written: "It is apparent that the subject-matter of the two acts is substantially the same; and it is equally apparent that the inhibition contained in the section of the Constitution quoted was violated by the enactment of the special or local law. It is of no consequence that the special or local act contains matter germane to the subject expressed in its title, 'to authorize the city council of Montgomery to refund the bonded indebtedness of said city,' etc., which are not in the general law; for, obviously, if the insertion of such matters in a special, local, or private law would obviate the constitutional prohibition, then the prohibition could be easily circumvented and practically rendered nugatory. It is not perceivable that the framers of the Constitution intended the prohibition to operate only against special, local, or private laws which are in *ipsis verbis* of the general law. It follows, therefore, that we are constrained to hold the act of September 26, 1903, to be unconstitutional and void."

In *Little v. State*, 137 Ala. 659, 668, 35 South. 134, 136, it was said with reference to section 105, among others noted in the opinion: "This view is emphasized, re-enforced, and made certain to the judicial mind when taken in connection with the sections above referred to, other than section 104, directing that the Legislature shall pass general laws for the cases enumerated in section 104, and providing that no special, private, or local law * * * shall be enacted in any case, which is provided for by general law."

[Dunn v. Dean.]

In *Forman v. Hair*, 150 Ala. 589, 593, 594, 43 South. 827, 829, it was said: "Section 105 of the Constitution is very broad and sweeping in its terms. Its purpose is manifest, and the Legislature is positively forbidden and prohibited from enacting any special, private, or local law, except a law fixing the time of holding courts, and regulating or prohibiting the liquor traffic, in any case which is provided for by a general law, or when the relief sought could be given by any court of this state. Prior to the adoption of the present Constitution, this court held (*Clarke v. Jack*, 60 Ala. 271) that it was the province of the Legislature to determine whether or not the 'cause' was provided for by a general law, or the relief sought could be given by any court. But this section (105) provides that the courts, and not the Legislature, shall judge as to whether the matter of said law is provided by a general law. If, therefore, the issue of the bonds by St. Clair county was provided for by the general law, approved February 26, 1903, the Legislature was forbidden to pass the act approved September 26, 1903, and the courts, and not the Legislature, are to determine that question. But this is not a case provided for by the general law of February 26, 1903, for the reason that the election was held prior to its enactment."

In *Norwood v. Goldsmith*, 168 Ala. 224, 231, 53 South. 84, 86, it was said: "What was said in the case of *Montgomery City v. Reese*, 149 Ala. 190, 43 South. 116, is equally applicable and true in this case, and is decisive of this question: 'Section 105, art. 4, of the Constitution provides that: "No special, private or local law, except a law fixing the time for holding courts, shall be enacted in any case which is provided for by general law, * * * and the courts, and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law. * * * Nor shall the Legislature indirectly enact any such special, private or local law by the partial repeal of the general law.'" It is apparent that the subject-matter of the two acts is substantially the same; and it is equally apparent that the inhibition contained in the section of the Constitution quoted was violated by the enactment of the special or local law,' " etc.

In *City Bank & Trust Co. v. State*, 172 Ala. 197, 201-205, 55 South. 511, 512, it was said: "In application of a pertinent phase of section 105 of the Constitution of 1901 it has been accepted here that a test of the exemption of a local, private, or special law from the condemnation of the section, because provision has

[Dunn v. Dean.]

already been made therefor by a general law, is whether the proceeding or action contemplated by the local, private, or special law might have been, in substance and not in respect of detail merely, taken or had under the general law. If so, the local, private, or special act violates the section (105) and is void.—*Brandon v. Askew*, 172 Ala. 160, 54 South. 605; *City of Montgomery v. Reese*, 149 Ala. 188, 43 South. 116; *Forman v. Hair*, 150 Ala. 589, 43 South. 827; *City of Ensley v. Simpson*, 166 Ala. 366, 52 South. 61; *Norwood v. Goldsmith*, 168 Ala. 224, 53 South. 84. * * * It was also noted, in that case, that by express provisions of section 105 the determination of inquiries whether the matter of the local, private, or special law was 'provided for by a general law,' and whether the relief sought could be 'given by any court,' was committed to the courts, and not left with the Legislature. The soundness of the doctrine of *City of Montgomery v. Reese*, has not been questioned or departed from. It is obvious from the unequivocal terms of section 105, that the enactment of local, private, and special laws is prohibited in all cases, not expressly excepted in that section (105), where the matter is provided for by general law, or where any court can give the relief the local, private, or special law would afford. In concrete cases the inquiry open must be, not what the section (105) prohibits, but whether the enactment assailed falls within either of the categories created by the section. As appears from the quotation from the *Reese Case*, *supra*, the application of the section is not to be determined by the fact that the enactment assailed is not *ipsis verbis* of the general law, nor by the fact that matter germane to the general law is contained in the enactment assailed. In short, the test is, as before stated, whether the subject-matter of the general law and of the local, private, or special law is the same.—*Authorities supra*."

The local act mentioned is assailed as constitutionally invalid, under section 105, because the subject-matter was, at the time of its approval, already provided for by the general law approved February 26, 1903. * * * The subject-matter of each act, the general and the local, is substantially the same; the latter being more ample in legislatively fixed detail of accomplishment of the purpose common to both acts. In *Green v. State*, 143 Ala. 2, 7, 8, 39 South. 362, 364, it was said: "The general law was different from this, requiring a special venire for each capital case. The relief sought by this amendment could not be obtained

[Dunn v. Dean.]

under any general law then existing, or the local law as stated would have been unnecessary. It in no sense, therefore, offends that provision of the Constitution (section 105) which prohibits the Legislature from enacting any special or local law by the partial repeal of a general law."

In *City of Ensley v. Simpson*, 166 Ala. 366, 373, 374, 52 South. 61, 64, it was said: "The departure worked by section 105 of the Constitution of 1901 has significance. The inhibition now is against special, private, or local laws in any case which is provided for by a general law, of which the courts shall judge. Formerly the inquiry was whether the Legislature could provide for a particular case by general law. Now the question is whether it has so provided. We need not be understood as impairing the authority of *City Council of Montgomery v. Reese*, 149 Ala. 188, 48 South. 116. The court there said that it could not perceive that the framers of the Constitution intended the prohibition to operate only against special, local, or private laws which are in *ipsis verbis* of the general law. The effect of the ruling was that the enactment of a general law authorizing municipal corporations to issue bonds to run not exceeding 30 years, while permitted to stand upon the statute books, operated as a constitutional inhibition against any act permitting any particular municipality to issue bonds to run not exceeding 30 years. Appellee's argument applies that decision to the case in hand as follows: The general statute permitting the alteration or rearrangement of municipal boundaries by the acquisition of contiguous territory only, while it stands, must operate as a constitutional inhibition against any act consolidating noncontiguous municipalities, if at the same time, and in order to preserve the unity and contiguity of the consolidated municipality, as perhaps is necessary to the validity of the act (*City of Denver v. Coulehan*, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751), intervening territory, contiguous to both of the constituent municipalities, is included in the act of consolidation. The subject of legislation in the general law is the alteration or rearrangement of boundaries as affecting contiguous municipalities and unincorporated territory. The subject-matter dealt with in the special act is the alteration or rearrangement of boundaries as affecting non-contiguous municipalities as well. Considered in their totality the two acts are not identical as to subject-matter. We therefore conclude that the special act is not obnoxious to section 105 of the Constitution."

[Dunn v. Dean.]

In *Brandon v. Askew*, 172 Ala. 160, 163, 164, 54 South. 605, 606, it was said: "In his opinion, which has been incorporated into the transcript, the learned judge of the Fifteenth circuit held, that the act of March 2, 1907, was violative of section 105 of the Constitution of 1901. The relevant provision of that section is expressed as follows: 'No special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state.' His theory, we gather, was that so long as there is to be found in the statute book a law fixing the salary of circuit solicitors in general terms, the Legislature is without power, when creating a new office of that character, to fix the salary of the new officer at a different amount. This opinion involved of course a holding that the act under consideration is a local act. And it has been so held.—*State ex rel. Attorney General v. Sayre*, 142 Ala. 641, 39 South. 240 [4 Ann. Cas. 656]. Whatever of obscurity there may be in this provision of the Constitution, it is certain that it was not intended to prohibit all local legislation. It was not intended to prohibit local legislation on subjects according to any specific classification. That was done in section 104, where those classes of local laws which were to be prohibited are catalogued, and presumptively the framers of the Constitution said in that section all they intended to say on that subject. It was not intended to operate against local legislation in those cases where a local statute undertakes to do something that has been precisely done in a general law. It could not be assumed that the Legislature would waste its time in the duplication of statutes. But if the local bill proposes something different from the provisions of the general law, and not within the catalogue of section 104; and in a case where the relief may not be had in some proceeding outside of the Legislature, how has it been provided for, and where is the inhibition to enact the local law? It seems, then, that this provision of the Constitution was intended to prohibit the enactment of special, private, or local laws to meet the purposes of particular cases which may be accomplished by proceedings outside of the Legislature under the provisions of general statutes enacted to meet all cases of their general character. And it is made the duty of the Legislature to pass general laws under which local and private interests shall be provided for and be protected.—Const. § 109. Such seems to have been the accept-

[Dunn v. Dean.]

ance of this provision in *City Council of Montgomery v. Reese*, 149 Ala. 188, 43 South. 116. It may be conceded that if the Legislature creates a new judge or solicitor, in the absence of provision to the contrary, the new officers would take their salaries under the general provision of the Code. But no Legislature can dispose of the right of its successors to provide for and protect a local, special, or private interest by local, special, or private law, except by the enactment of a general law under which the local, special, or private interest may be adequately provided for and protected without further legislation. There was, of course, and could be, no way of providing for a new circuit with its necessary officers except by a legislative enactment for that purpose. New circuits may therefore be arranged and the salaries of its officers fixed according to the legislative opinion at the time of the public necessity for which provision and relief is to be made. In our opinion the statute creating the Fifteenth circuit, as for the objection here taken to it, evidences in all its parts a valid exercise of the legislative power.—*Ensley v. Simpson*, 166 Ala. 366, 52 South. 61."

A consideration of the decisions noted and quoted, makes manifest the fact that this court has neither entertained nor expressed any degree of departure from or qualification of the interpretation of the above-quoted provisions of section 105 of the Constitution soundly established in *Sisk v. Cargile*, *City Council v. Reese*, and *Forman v. Hair*, in and by the expressions before reproduced from the opinions in those cases.

The local act under review has no substantial counterpart, in respect of its paramount features and purposes, in any general law to which this court has been referred, or of which it is now informed. This act's chief object and dominant purpose and effect was and is to create a county governing body different in personnel; in the selection of its personnel; in the tenure of its personnel; from that provided by the general laws for the constitution and creation of the courts of county commissioners in the state. The powers, duties, and jurisdiction of the body created by this act are practically the same as those conferred upon and required of the courts of county commissioners. Indeed, if the change sought to be wrought by this local act had been but an effort to alter the name of Conecuh's governing body, there would be no hesitation in pronouncing it invalid under the plain injunction of section 105 of the Constitution. But, as appears from our

[Dunn v. Dean.]

summary of the provisions of the local act, its purpose and effect is far greater than any mere change of name or alteration in respect of minor detail within the rule established in *City Council v. Reese*, 149 Ala. 188, 43 South. 116. It creates a body constituted of members separately chosen by the electorate of separate districts, thus excluding the judge of probate who, under the general law, was the presiding officer of the commissioners' court. This departure from a body the members of which were chosen by the electorate of the whole county, and for terms of four years (aside from the judge of probate who is chosen for a term of six years), to a body the constituents of which are elected by and from districts only, and for terms so ordered and arranged as to prevent the expiration of the terms of all the members at one time, are radical and, in proportion to the subject, superlative changes from the status fixed by general law to a status not contemplated or provided for by general laws. Our opinion, therefore, is that this act is not offensive to the quoted provisions of section 105 of the Constitution. We are advised of no provision of the Constitution that inhabits the Legislature from creating a county governing body as the result of elections of its members by the electorate of defined districts.

(4, 5) That provision of section 16 of the local act, whereby a failure or refusal to have quarterly statements published is attempted to effect, without trial and without reference to the established methods of impeachments, the vacation of the offices held by the members of the board, is patently void, being offensive to the following sections of the Constitution: 6 and 175. But this particular invalid feature of the act may be stricken therefrom without invalidating the remainder thereof which is "complete within itself, sensible, capable of being executed, and wholly independent of that which is rejected."—*State v. Davis*, 130 Ala. 148, 151, 30 South. 344, 89 Am. St. Rep. 23.

(6) This act does not offend sections 42 and 43 of the Constitution by blending in one body powers and authority that may be referred to the executive, legislative, or judicial phases of governmental action.—*Fox v. McDonald*, 101 Ala. 51, 69, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; *Com'rs v. Moore*, 53 Ala. 25; *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576, 17 South. 112.

(7) The local act does not violate subdivision 29 of section 104 of the Constitution. It does not purport to make provision

[Dunn v. Dean.]

for the "conduct of elections," or to designate places of voting, or to change the existing boundaries of wards, precincts, or districts. It assigns a member of the board to each of five districts for his election which the act itself originally creates for the purpose of defining the territory in which the electorate may vote for a member of the board resident of that district.

(8) The compensation provided by this act to be paid to members of the board for services in discharge of their official duties appears to be the same, aside from the limitation of \$150, as that allowed by law for and to the judge of probate and members of commissioners' courts for like services.—Code, §§ 3720, 3322. Subdivision 24 of section 104 of the Constitution prohibits the Legislature from enacting any private, special or local law "creating, increasing, or decreasing fees, percentages, or allowances of public officers." In *Miller v. Griffith*, 171 Ala. 337, 342, 343, 54 South. 650, 652, it was said of the quoted provisions: "That section refers only to changing the compensation during the term of the officer, and cannot be construed as prohibiting the Legislature from making provisions for such matters as [are] applicable to officers subsequently appointed, nor for abolishing offices."

The obvious intent of the quoted provision of section 104 was to require uniformity in respect of fees, percentages, and allowances by prohibiting the enactment of local or special laws on those subjects. The result, in part, of the construction given these provisions in *Miller v. Griffith* was to accord them the same effect as must be accorded section 281 of the Constitution; whereas, the manifest purpose of subdivision 24 of section 104 was to restrain local or special legislation. The error in *Miller v. Griffith* is clear; though it should be remarked that the last clause in the quotation made from the opinion in that case is without fault. The local act under review relieved the judge of probate of certain duties that were but incidental to the service of that office and that officer, and, in consequence of the abolition of these duties, took from him (to be subsequently elected) the compensations theretofore allowed the judge of probate for these merely incidental services. Hence, the act under consideration did not, in any direct, primary sense, create, increase, or decrease the fees, percentages or allowances of a public officer. The subdivision quoted is not offended by this act.

[Dunn v. Dean.]

The local act is not void as upon any of the grounds asserted by the appellant, all of which are treated in this opinion. The writ was properly denied.

Affirmed.

ANDERSON, C. J., and MAYFIELD, SAYRE, SOMERVILLE, GARDNER, and THOMAS, JJ., concur.

ON REHEARING.

MCCLELLAN, J.—(9, 10) For the first time, in the application for rehearing, the appellant presents and presses the question whether in the passage of the local act under consideration the positive requirements of section 62 of the Constitution were observed. In determining questions of this character the only source of information are the journals of the houses of the Legislature.—*Robertson v. State*, 130 Ala. 164, 169, 30 South. 494. Section 62 provides: "No bill shall become a law until it shall have been referred to a standing committee of each house, acted upon by such committee in session, and returned therefrom, which facts shall affirmatively appear upon the journal of each house."

The Journal of the House of Representatives records the introduction of this bill (H. B. 863) and its reference to the standing committee on ways and means; and, instead of the consideration and report of the bill by the ways and means committee, recites its consideration and favorable report by the standing committee on mining and manufacturing. It is thus conclusively shown that the bill was referred to one standing committee and was later considered by and reported from another standing committee, to which the journal does not affirmatively recite the bill was referred. The bill was therefore not validly enacted into law, the positive requirements of section 62 of the Constitution not having been observed.—*Walker v. City Council*, 139 Ala. 468, 36 South. 23; *Tyler v. State*, 159 Ala. 126, 48 South. 672; among others. The bill never became a valid enactment. It is void. The rehearing must be granted; and the prayer of the petition for the writ of mandamus must also be granted.

The order and judgment of the circuit judge is reversed; and a judgment will be entered here awarding the writ of mandamus as prayed.

Reversed and rendered. All the Justices concur.

[Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.]

Allgood, Auditor v. Sloss-Sheffield Steel & Iron Co.

Mandamus.

(Decided April 20, 1916. 71 South. 724.)

1. **Statutes; Amendment; Repeal by Implication.**—Where an amendment changes the old law in its substantial provisions, it, by necessary implication, repeals the old law so far as its provisions are in conflict.

2. **Same.**—Whether in the form of an amendment or otherwise, if a new law covers the whole subject matter of a former law, and is inconsistent with it, and is evidently intended to supersede the old law, it repeals it by implication.

3. **Same.**—Where a statute is amended, “so as to read as follows,” the amendatory act becomes a substitute for the original, and the original ceases to have the cause and effect of an independent enactment, but so much of the original as is retained in the amending act without substantial change, is affirmed and continued in force without interruption, and such parts as are omitted are repealed,

4. **Same; Re-enactment.**—The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed as a continuation of the original statute, and not as an implied repeal.

5. **License; Invalid Tax; Recovery.**—During the years 1907, 1908 and 1909, petitioner paid to the probate judge certain sums of money as a privilege tax under Acts 1907, p. 455, which was declared unconstitutional and void, and now applies for a refund under § 2411, Code 1907, which was amended by Acts special session 1909, p. 166, Aug. 25, 1909, and further amended by Act of Feb. 22, 1915, Acts 1915, p. 120, re-enacting the amended statute, with an added provision, and General Revenue Act 1915, p. 489, re-enacted the amendatory act of 1909, without reference to the original statute. Held, that neither the amendatory nor the revisory acts of 1915 altered the retrospective limit prescribed by § 2411, Code 1907, as amended, and hence, that the original limitation for money paid since Aug. 25, 1907, was ipso facto retained.

6. **Same; Refund; Mistake.**—The provisions of § 2411, Code 1907, were intended to promote justice and equity between the taxing power and the tax payer, and to correct mistakes either of law or fact.

7. **Same; Recovery; Laches.**—The claim of a tax payer to recover money that was paid under an invalid license law, will be denied under common law practice if not prosecuted with reasonable diligence, although not barred by any analogous statute of limitation.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Mandamus by Sloss-Sheffield Steel & Iron Company originally directed to C. Brooks Smith as State Auditor, and revived

[Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.]

against M. C. Allgood as his successor in office, to compel him to issue his warrant for certain license taxes paid into the State Treasury under an act declared unconstitutional and void. From a judgment granting the writ the Auditor appeals. Affirmed.

WM. L. MARTIN, Attorney General, and J. P. MUDD, Assistant Attorney General, for the State. TILLMAN, BRADLEY & MORROW, and STEINER, CRUM & WEIL, for appellee.

SOMERVILLE, J.—The following principles of statutory construction must be regarded as thoroughly well settled, both upon the soundest reasoning and the highest authority:

(1, 2) 1. "Where an amendment is made that changes the old law in its substantial provisions, it must, by a necessary implication, repeal the old law so far as they are in conflict. And where a new law, whether it be in the form of an amendment or otherwise, covers the whole subject-matter of the former, and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication."—36 Cyc. 1082 (D); *Scott v. Simons*, 70 Ala. 352; *Ogbourne v. Ogbourne*, 60 Ala. 616; *Cahall v. Citizens' etc., Ass'n*, 61 Ala. 232; *Lemay v. Walker*, 62 Ala. 39.

(3) 2. "Generally speaking, where a statute is amended 'so as to read as follows,' the amendatory act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption; that so much of the act as is omitted is repealed; and that any substantial change in other portions of the original act, as also any matter which is entirely new, is operative as new legislation."—36 Cyc. 1083 (2); *O'Rear v. Jackson*, 124 Ala. 298, 26 South. 944; *In re Estate of Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; *Moore v. Mausert*, 49 N. Y. 332; *Pacific, etc., Co. v. Joliffe*, 69 U. S. 450, 17 L. Ed. 805; *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429; *Bear Lake, etc., Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327; *Great Northern Ry. Co. v. United States*, 155 Fed. 945, 84 C. C. A. 93, affirmed in 208

[Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.]

U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567, citing many other cases.

(4) 3. "The repeal and simultaneous reenactment of substantially the same statutory provisions is to be construed, not as implied repeal of the original statute, but as a continuation thereof."—36 Cyc. 1084 (E); Endlich on Statutes, § 490; Sutherland on Stat. Construction, § 134; *Forbes v. Board of Health*, 27 Fla. 189, 9 South. 446, 26 Am. St. Rep. 63; *Brown v. Pinkerton*, 95 Minn. 153, 103 N. W. 897, 900, 111 Am. St. Rep. 448; *Haspel v. O'Brien*, 218 Pa. 146, 67 Atl. 123, 11 Ann. Cas. 470, and note 472; *White, etc., Co. v. Harris*, 252 Ill. 361, 96 N. E. 857, Ann. Cas. 1912D, 536.

(5, 7) Section 2411 of the Code of 1907 provided for a refund of a proportionate part of the license tax paid for conducting a business afterwards prohibited by law. This statute was expressly amended by the act of August 25, 1909 (Sess. Acts 1909, p. 166), which re-enacted verbatim the original statute, and added the following: "And any person who, through a mistake or error in the probate judge, has paid to the probate judge money that was not due from him for such license, or by such mistake has paid to the probate judge for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded to him the amount in either event so erroneously collected by the probate judge, and the provisions of this section shall apply in cases where money has heretofore been so erroneously paid within two years before the approval of this act."

In October of each of the years 1907, 1908, and 1909 the petitioner paid to the probate judge of Jefferson county certain sums of money as privilege taxes, under the revenue act of March 7, 1907 (Acts 1907, p. 455), which was unconstitutional and void. Thereafter by the act of February 22, 1915 (Sess. Acts 1915, p. 120), the Legislature again amended section 2411 of the Code, as already amended, by re-enacting the amended statute verbatim and added thereto a provision requiring the probate judge himself to refund license money paid for conducting a business afterwards prohibited before the probate judge has paid over such money to the state authorities. Later on in the same session, by the act of September 14, 1915 (Sess. Acts 1915, pp. 489-533) the Legislature passed a general revenue bill which re-enacted verbatim the amendatory act of August 25, 1909, as section 15 thereof, and re-enacted also verbatim section 2412 of the Code

[Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.]

as section 16 thereof without reference in either case to the original statute.

It will be observed that the limitation of the statute as amended in 1909 to license money "paid within two years before the approval of this act" that is, two years prior to August 25, 1909, is carried forward *ipsis verbis* into the amended statute of February 22, 1915, and also into the general revision of the revenue laws by the act of September 14, 1915. The contention of the respondent is that the use of this original clause in each of the two last-named acts is effective *ex vi terminorum* to initiate a new period of limitation, that is, a period of two years before the approval of each act thereby nullifying the operation of the law as to all erroneous payments made prior thereto. Of the character and policy of this refund statute this court has said: "It is the successor of preceding statutes having a common object—the promotion of justice and equity between the state and county and the taxpayer. If by mistake, whether of law or of fact, the state or county has, through the medium of taxation, received money of the taxpayer to which it was not entitled *ex aequo et bono*, it is but natural right and justice that the mistake should be corrected and the money refunded."—*White v. Smith*, 117 Ala. 232, 23 South. 525; *Bigbee, etc., Co. v. Smith*, 186 Ala. 552, 65 South. 37.

This just policy has been steadily expounded by successive acts of legislation.

The limitation of its operation when first applied to license money paid by mistake, to a reasonable period of antecedent time, was natural, and indeed practically necessary. But this was a limitation upon the retrospective operation of the original law and not upon recovery by the taxpayer, whose claim, if not prosecuted with reasonable diligence, will be shorn of its remedy on common-law principles of laches even though not barred by any analogous statute of limitation.—26 Cyc. 392, B, and cases cited; *State v. Benners*, 172 Ala. 168, 55 South. 298.

Looking to the obvious purpose of the Legislature in its amendatory and revisory acts of 1915 as evidenced by the new provisions added to the original text of the amendatory act of 1909, we can discover no intention in either of these later acts to alter the limit of the retrospective operation of the law as prescribed by the act of 1909. Certainly there could have been no intention to shift that operation a second time within a year as

[Allgood, Auditor, v. Sloss-Sheffield Steel & Iron Co.]

to license money erroneously paid, and leave its operation unchanged, and indeed unlimited, as to other license money.

Applying the rules of construction above declared, it results that the acts of 1915, although they nominally and severally repeal by implication the previously existing statutes, by re-enactment continue in force without interruption the provisions of section 2411 of the Code, as amended by the act of 1909, and the original limitation to money paid since August 25, 1907, is ipso facto retained. In other words the reiterated phrase, "paid within two years before the approval of this act," must be construed as speaking from its original enactment and operating constantly from that date. For this conclusion we have the highest authority. A New York statute gave jurisdiction to the Court of Appeals to review "every actual determination hereafter made," etc. A later statute re-enacted the original as above written, and extended the jurisdiction to other cases.

The following extract from the opinion of DENIO, C. J., in *Ely v. Holton*, 15 N. Y. 595, 598, is in principle as applicable here as it was there: "The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken would be made irregular or void by force of the subsequent statute, and confusion of every kind would be introduced. Nor do we think that the consideration that the amended section reads, the original one did, that this court shall have jurisdiction to review determinations 'hereafter made,' limits the effect of the amended portions or the newly introduced provisions to cases in which the judgments appealed from were rendered after the amendment took effect. That is a portion of the old section which is preserved unaltered. When it was first enacted, it was thought expedient to confine the review by this court to future judgments and orders; but the incorporation of the amendment into a section which was originally thus limited does not prove that the new provisions are to be confined to determinations future in relation to the time the amendment took effect. The theory of amendments, made in the form adopted in the present instance, we take to be this: The portions of the sections which are repealed are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect. In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the one above sug-

[State, Use of Winston County v. Tingle.]

gested of preserving a harmonious text, so that, when future editions shall be published, the scattered members shall easily adjust themselves to each other."

In a later case a different bench of the same court construed the word 'hereafter' in an amended materialman's statute and said: "It follows that the word 'hereafter' in the first line of section 1 of chapter 402, Laws of 1854, being contained in the section as amended by chapter 588, Laws of 1869, continues to speak from the time of the passage of the act of 1854, and applies to and includes all labor and materials after that time."—*Moore v. Mausert*, 49 N. Y. 332.

See, also, the case of *Barrows v. People's, etc., Co.* (C. C.), 75 Fed. 794, wherein a similar construction was placed on the phrase "now existing," where a former act was re-enacted with a repetition of those words; the holding being that they must be applied as of the date of the original, and not of the amended, act.

The petition shows that petitioner is entitled to have a refund of the money claimed, and the trial court did not err in overruling the demurrers thereto, and in awarding on the evidence a peremptory writ of mandamus to respondent requiring him, as state auditor, to draw his warrant upon the treasurer for the amount claimed.

The judgment of the city court will therefore be affirmed.
Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

State, Use of Winston County v. Tingle.

Taxes.

(Decided May 11, 1916. 71 South. 991.)

Taxation; Collection; Liability on Bond.—Where a tax collector authorized the county treasurer to apply taxes collected for a certain year on those due for the preceding year, or knowingly permitted such application without objection, he was guilty of a conversion of the taxes collected, rendering him and his bondsmen liable.

APPEAL from Winston Circuit Court.
Heard before Hon. JOHN H. MILLER.

[State, Use of Winston County v. Tingle.]

Action by the State for the use of Winston County, against J. M. Tingle and others, to recover for taxes collected. From a judgment for plaintiff for an amount less than that claimed, plaintiff appeals. Reversed and remanded.

BANKHEAD & BANKHEAD, for appellant. No counsel marked for appellee.

SAYRE, J.—Appellee Tingle, to whom we will refer as the defendant, succeeded himself in office as tax collector of Winston county on July 1, 1913, giving a new bond for the faithful discharge of the duties of his office during the term upon which he then entered. On February 23, 1914, being largely in arrears in his accounts with the state and county, he abandoned his office. The state, suing for the use of Winston county, brought this action against the defendant and his sureties for the term above stated, and on March 23, 1915, recovered judgment for the sum of \$1,279.60. Evidence for the plaintiff limited the claim to a shortage on account of taxes that were collected, or should have been collected, for the county during the year 1913, by which we mean to say that the plaintiff made no effort to charge defendants with a shortage for any previous year. Aside from the controversy about the item to be presently mentioned, it appeared without serious dispute that at the time of the trial defendant was in default on account of taxes collected for the year 1913 in a sum approximating \$5,000, and by this appeal plaintiff complains that the verdict and judgment should have been for this amount. The contention here arises out of an item of \$3,658.06 paid by the defendant to the county treasurer on November 10, 1913. This sum was derived from tax collections for the current year. Defendant took a receipt for this payment in words and figures as follows:

"No. 104. November 10th, 1913. Received of J. M. Tingle \$3,658.06 account of balance due on county taxes for the year 1912 as per examiner's report."

With reference to this payment Sutherland, the county treasurer, testified as follows:

"On the 10th day of November, 1913, J. M. Tingle turned over to me as county treasurer the sum of \$3,658.06. It was turned over to me as tax money. Mr. Tingle was not given credit for that sum of \$3,658.06 for 1913 taxes. I suppose it was the coun-

[State, Use of Winston County v. Tingle.]

ty's tax money. He turned it over to me as tax collector, and I received it as county treasurer. * * * I don't know that that money was collected for 1913. It was after the tax year commenced. When Mr. Tingle paid the said sum of \$3,658.06 on the 10th day of November, 1913, he said he wanted to settle the balance due by him on 1912 taxes. For that reason he was not given credit for that payment on the 1913 taxes, because he made the request that it be credited on 1912 taxes, and it so appears on the receipt that I gave him for the money, and on the stub of the receipt. That closed up the taxes due for 1912, and I applied it just as he said."

The defendant, testifying as a witness, said: "In November, 1913, when I paid Sutherland \$3,658.06, I never told him to put that on a former year. He suggested that when I paid him the money. As far as my knowledge is concerned, I didn't know I owed them anything. I told him I was going to pay him over some money for 1913. He said there is something they have you charged with for 1912 taxes, and we had better get that straight and commence on 1913. He went on then and placed it back there. I never told him to do it. He did it. That was after the collection for taxes for 1913 began. It was in November, and that money I had collected was for taxes for that year. I told Mr. Sutherland, the treasurer, that I was going to pay over some taxes that I had collected."

And on cross-examination the defendant testified: "The report showed that it was for taxes for 1913. I told him that. When Mr. Sutherland told me I owed some taxes for 1912 that hadn't been paid in, I didn't say anything to him. When he said that he was going to apply it to that year, I didn't say anything at all. I didn't tell him not to do it. That was taxes I had collected for the period this bond sued on here was executed. All the money I paid over while I was tax collector I paid over to Mr. Sutherland and took receipts."

The court left it with the jury to say whether on this evidence the defendant and the sureties, sued with him, were entitled to a credit for the amount of the payment in question, and it is entirely clear that the jury allowed the credit.

In our view of the case, the points of difference between the testimony of these witnesses should not have been submitted to the jury as of possible controlling importance in determining the amount of plaintiff's recovery; for, notwithstanding those

[State, Use of Winston County v. Tingle.]

differences, the fact remained without dispute that the payment was applied in acquittance of taxes collected for 1912, and this was an unlawful conversion of the money so applied, accomplished, if not by defendant's direction, at least with his full acquiescence and consent. In either case the sureties were liable.

The law directed the proper application of the payment, but the county, as a composite governmental agency, could not know and was under no duty to inquire, at its peril, from what source the money came. It was the duty of the defendant to see that a proper application was made. If the county treasurer was a party to the misappropriation, that did not lessen defendant's wrong in permitting it to be made nor excuse him and his sureties. The sureties were liable for all moneys received by their principal after their bond was given. They could not relieve themselves by showing that their principal used such moneys or any part thereof to satisfy past delinquencies. Highly favored as sureties generally are, their rights in the present case were limited by the positive law the observance of which by their principal their bond was intended to secure. To allow the credit did not correct the wrong that had been done nor fill the undisputed void in the county treasury, while, as for sureties, the course adopted merely shifted the burden of making good defendant's deficit from one set of sureties to another. The defendant should not have been heard to claim a credit for the sum in question on his collections for 1913 after he had received a credit for the same sum on his collections for 1912. He consented at least to the unlawful misapplication of the payment when it was within his power and duty, as prescribed by law, to see that a proper application was made, and that should have been the end of his claim for a further credit of the same sum; should have been the end of the contention on the part of the sureties that the payment be credited to the fund on account of which it had been received by the defendant. If the defendant had simply delivered the sum in question to the treasurer, and without fault on his part it had been improperly credited on his collections for 1912, no doubt, the sureties would have been entitled to have its use adjudged in acquittance of the collections for 1913. Most likely the court below took the view of the law herein expressed, and our difference arises out of our different conclusion as to the effect of the evidence; but to us it seems that the undisputed testimony establishes the fact that defendant was

[Kyle v. Jordan.]

at least a willing party to the misapplication of the payment, though he may not have suggested it in the first place, and afterwards allowed the credit to remain as it had been placed for such benefit as might thereby accrue to him. This was a conversion of the money. He had therefore no right to the credit claimed in this action, and to permit the sureties to have the payment credited against their liability would allow them to make a shield and a defense of the wrong of the officer whose faithful discharge of the duties of his office they had guaranteed. —*State v. Sooy*, 39 N. J. Law, 539; *Walker County v. Fidelity & Deposit Co.*, 107 Fed. 851, 47 C. C. A. 15.

We have had no brief for appellees. We have inferred the nature of the defense from the authorities cited by appellant. Our best judgment is that the court erred in its action on the charges and in overruling the motion for a new trial.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Kyle v. Jordan.

Ejectment.

(Decided February 10, 1913. Rehearing denied March 30, 1913.
71 South. 417.)

1. *Deeds; Separate Writings; Construction.*—Whether or not a supplemental writing not referred to nor identified in an executed deed can be offered and received in evidence as a part of the deed, must depend upon the following considerations: 1. It must be written contemporaneously with the deed by the grantor or his draughtsman; 2. It must be physically before the grantor when he executes the deed; 3. It must be delivered to the grantee or his agent, along with and as a part of the deed; 4. It must not contradict any of the express terms of the agreement; and 5. Upon its face, it must be continuous, coherent and consistent with that part of the deed, which it purports to supplement; that is, there must be internal evidence of the identity and unity of the two items as constituting a single transaction.

2. *Same.*—The supplementary writing in this case contradicting the deed both as to parties and consideration, was improperly received in evidence as a part of the deed.

3. *Same.*—While the rule is not absolute that a deed and a supplemental paper, claimed to be a part of the deed, shall indicate a reference to each other on their face, and in some cases parol evidence of contemporaneous

[Kyle v. Jordan.]

facts may be admissible to show their connection, yet to allow such proof, there must be internal evidence of the identity and unity of writing, as constituting a single transaction.

4. **Frauds; Statute of; Real Property.**—The great controlling purpose of the statute of frauds as to real estate is the requisition of written evidence as to all contracts for the sale of land.

(McClellan, Somerville and Gardner, JJ., dissent.)

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

Ejectment by S. E. Jordan against R. B. Kyle. Judgment for plaintiff and defendant appeals. Reversed and remanded.

W. J. BOYKIN, and GEO. D. MOTLEY, for appellant. HOOD & MURPHREE, for appellee.

MAYFIELD, J.—(1) When this case was here on former appeal, we ruled that the supplemental writing, on a separate piece of paper, containing additional matter of description to that in the deed, was admissible in evidence as a part of the deed, under the evidence as it then appeared of record. See 187 Ala. 355, 65 South. 522. The authorities on the subject of the admissibility in evidence of separate writings, not signed, as parts of deeds or wills, were reviewed at some length; and in holding the separate writing in this case to be admissible as supplementing the deed in question, the following rule, to which we yet adhere, was laid down:

“We hold that whether or not a supplemental writing, not referred to nor identified in the executed deed, can be offered and received in evidence as a part of the deed must depend upon the considerations: (1) It must be written contemporaneously with the deed by the grantor or his draftsman; (2) it must be physically before the grantor when he executes the deed; (3) it must be delivered to the grantee or his agent along with and as a part of the deed; (4) it must not contradict any of its expressed terms; and (5) it must, upon its face, be continuous, coherent, and consistent with that part of the deed which it purports to supplement, that is, there must be internal evidence of the identity and unity of the two writings as constituting a single transaction.”

(2) On further consideration we are now convinced that we were wrong in holding the separate writing admissible as a part

[Kyle v. Jordan.]

of the deed. We now hold that the record in this case does not bring the separate writing within either the fourth or the fifth qualification of the rule above quoted from the opinion on the former appeal. There are contradictions, in express terms, between the recitals in the deed and those in the separate writing, as to both the parties to, and the consideration for, the deed. In the deed proper the grantee is described as M. Clonninger, and the consideration is stated to be \$15 per acre, cash in hand paid; while in the separate writing the recital is that L. Clonninger is to pay \$15 per acre. These are certainly contradictions in express terms. We are now of the opinion that there is no internal evidence of the identity and unity of the two writings as constituting a single transaction, sufficient to dispense with a reference in the deed to the separate writing. The deed on its face indicates no reference to this or any other separate writing as being supplementary thereto. While it is possible, or even probable, that both the deed and the separate writing may relate to, or attempt to describe the same piece of land, yet there is no reference in the deed to any separate writing necessary to complete it, and nothing on the face of the papers to show that one is contemporary to the other. The evidence to this end is wholly oral, and therefore inadmissible and unavailing to unify the two writings.

(3) We still adhere to the former holding of this court that the rule is not absolute that the several papers shall, on their face, indicate a reference to each other, and that parol evidence may be admissible, in some cases, of contemporaneous facts, to show connection between the several writings; but to allow such proof, there must be some internal evidence of the identity and unity of the several writings as constituting a single transaction. This question was discussed, and the authorities were reviewed at some length, in *Bryan's Appeal*, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393, it was there said:

“‘First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms.’ In a California case upon this subject this language is used: ‘But before such an extrinsic document may be so incorporated, the description of it in the will itself must be

[Kyle v. Jordan.]

so clear and explicit and unambiguous as to leave its identity free from doubt.'—*Estate of Young*, 123 Cal. 337, 342, 55 Pac. 1011. In an important and well-considered English case, decided in 1902, the court uses this language upon this subject: 'But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained. * * * The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document.'

(4) While the rule has probably been relaxed, in this state, to the extent that there need not be an express reference in the deed, will, or other writing to the separate extrinsic document, yet we hold that there must be internal evidence of the identity and unity of the two writings as constituting a single transaction. To allow parol proof to unify such writings, when there is no direct reference in one to the other, and no internal evidence of the identity and unity of the two writings, would tend to do away, in a degree, with the statute of frauds, and to make the effect of all documents required to be in writing indefinite and uncertain. The great controlling purpose of the statute is the requisition of written evidence of all contracts for the sale of lands.

"The meaning of the statute," said Lord Hardwicke, in *Welford v. Beazley*, 3 Atk. 503, "is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and therefore, both in this court and the courts of common law, when an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon."

We therefore adhere to what was said in *Jenkins v. Harrison*, 66 Ala. 360: "The rule is general that several papers, relied on to meet the requirements of the statute of frauds, should, on their face, indicate a reference to each other.—*Carter v. Shorter*, 57 Ala. 253; *Knox v. King*, 36 Ala. 367. The rule is not absolute, and there are cases in which parol evidence of contemporaneous facts, and of the circumstances in which the parties were when the writings were signed, will be received to show their connec-

[Gilliland v. Armstrong.]

tion.—*Thyare v. Luce*, 22 Ohio St. 62; *Salmon v. Goddard*, 14 How. (U. S.) 446 [14 L. Ed. 493]; *Beckwith v. Talbot*, 95 U. S. 289 [24 L. Ed. 496]. As said in the case last cited: "There may be cases in which it would be a violation of reason and common sense to ignore a reference which derived its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But when there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud.'"

A close inspection of this record certainly leaves no ground for doubt, and the general rule should be here enforced.

It is also now made to appear that the deed proper was recorded, but that the slip of paper claimed to be a supplement or part thereof was not recorded as a part of the deed. If the separate slip was a part of the deed, it would seem that it should have been recorded with the deed.

As we have held that parol evidence was not admissible to show that the slip of paper in question was a part of the deed, it is unnecessary to decide whether or not M. Clonninger was a witness competent to testify as to that question.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and THOMAS, JJ., concur. McCLELLAN, SOMERVILLE, and GARDNER, JJ., dissent.

Gilliland v. Armstrong.

Ejectment.

(Decided April 13, 1916. 71 South. 700.)

1. **Property; Possession; Presumption.**—The possession of real property raises the presumption of ownership.

2. **Ejectment; Evidence; Conclusion.**—Where it appeared that defendant held possession under a default judgment in a previous action against the present plaintiff, plaintiff, by introducing a decree of the probate court authorizing a sale of the property by the tax collector, drawn in Code form, and reciting that notice of the proceeding had been duly given, for the purpose of showing that defendant claimed under a tax title, and in anticipation of a defense therein, was not divested of a right to show that, with respect to the recited notice, the decree was without the jurisdiction of the court.

[Gilliland v. Armstrong.]

3. **Taxation; Sale; Notice.**—Under § 2272, Code 1907, the record, although importing notice to Georgia Armstrong, did not import notice to her personal representative, she having died before the rendition of the decree directing a sale of the property for taxes.

4. **Same; Jurisdiction of the Probate Court.**—In proceedings for the sale of property for delinquent taxes, the jurisdiction of the probate court is limited and statutory, and in order to sustain its judgment, the record must show the facts essential to its jurisdiction, in the absence of other proof of the regularity of the proceedings that went before.

5. **Same; Lost Notice; Proof.**—It is competent to prove its contents where the notice of a tax sale given to the person assessed, or to his personal representative, has been lost or mislaid.

6. **Same; Deed as Evidence.**—The probate judge's deed in a tax sale is only prima facie evidence of the regularity of all proceedings subsequent to the judgment recited by them, and does not cure defects in the record of the judgment, and its necessary antecedent proceedings under § 2397, Code 1907.

APPEAL from Morgan Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Statutory ejectment by William Armstrong against J. A. Gilliland. Judgment for plaintiff and defendant appeals. Affirmed.

SAMPLE & KILPATRICK, for appellant. H. V. CASHIN, for appellee.

SAYRE, J.—(1, 2) Statutory action in the nature of ejectment. The property in suit was assessed to Georgia Armstrong for taxation in the year 1910. She was then in possession, and there is no evidence to contradict the presumption of ownership thus raised. In November, 1910, she died leaving plaintiff (appellee), her husband, but no children. Plaintiff proved these facts and offered in evidence a decree of the probate court rendered at the May term, 1911, authorizing and directing a sale of the property by the tax collector, under the caption "Geo. C. Hardwick, Tax Collector, v. Armstrong, Georgia, colored." This decree was in Code form, and contained a recital that notice of the proceeding had been given as required by law. It seems that plaintiff offered the tax proceeding, as far as he went, for the purpose of showing that defendant claimed under a tax title and in anticipation of a defense under that title. In the further course of plaintiff's examination as a witness it appeared that defendant held possession under a default judgment that had been recovered by Gilliland March 23, 1914, in a previous action brought by him against plaintiff here and his tenants. By in-

[Gilliland v. Armstrong.]

roducing this decree evidently plaintiff did not intend to conclude his own title, nor did he thereby divest himself of the right to show that, in respect of the recited notice, the decree was without the jurisdiction of the court, as in fact it was under plaintiff's uncontradicted testimony, unless its recital of notice was as matter of law conclusive against his testimony.

(3, 5) Our opinion is that in the circumstances of the present case it was not evidence of notice according to law, though doubtless it would have been had the decree been rendered in the lifetime of Georgia Armstrong, against whom it purported to be rendered.—*Driggers v. Cassady*, 71 Ala. 529. Section 2272 of the Code provides that notice of a proceeding for the sale of land for delinquent taxes "must be served by the tax collector, or his deputy, by handing a copy thereof to the party to whom it is addressed, or his agent, or by leaving a copy thereof at the residence or place of business of such party, or his agent; and, with his endorsement thereon, showing how and when served, or if not served, showing his reasons for not serving the same; it must be by the collector, or his deputy, returned into court on or before the first day of the next term thereof. If the party against whom such assessment was made has since died, and letters testamentary or of administration have been granted upon his estate, such notice must, in like manner, be served on his personal representative, if a resident of the county."

Plaintiff resided in the county, and had taken out letters of administration on the estate of his wife. The tax collector's return on the notice was not offered in evidence. It will be observed that the presumption of notice arises, not by virtue of the statute, but from the recital of the decree. Underlying the entire proceeding was the fact that the power of the probate court in proceedings for the sale of property for taxes was limited and statutory, and on familiar principle, to sustain its judgment, the record, in the absence of other proof of the regularity of the proceedings that went before, should have shown the facts essential to the exercise of its jurisdiction.—*Carlisle v. Watts*, 78 Ala. 486; *Johnson v. Harper*, 107 Ala. 706, 18 South. 198. The record had its beginning in the tax collector's book. Assuming that "Geo." in the advertisement of sale may be allowed to stand for "Georgia," the name of the owner to whom the property was assessed, though we are not at all satisfied with the propriety of the assumption, the record showed a proceeding from beginning

[Knight v. Garden.]

to end against Georgia Armstrong. The decree must be read with reference to the rest of the record. So read, it imports notice to Georgia Armstrong. But it cannot be sustained as a decree against her, for the very good reason that she died months before the decree was rendered. When she died the liability for taxes shifted along with the descent of the property to her heir or personal representative. To meet this situation the statute provides that notice must be served on the owner's personal representative, if a resident of the county, as was the case here, and so it follows a new element might have been introduced and a new meaning given to the decree by proof of the original of a notice to plaintiff as the personal representative of deceased, or if such notice had been lost or mislaid, it would have been competent to prove its contents.—*McGee v. Fleming*, 82 Ala. 276, 3 South. 1.

(6) As for the probate judge's deed, introduced by defendant, it was only "prima facie evidence of the regularity of all proceedings subsequent to the judgment recited therein."—Code, § 2297. It did not cure defects in the record of the judgment and its necessary antecedent proceedings. In the presence of the undisputed proof of Armstrong's death prior to the decree, and in the absence of record evidence showing service of notice on plaintiff as administrator of her estate or a recital of notice in that particular form, it did not appear that the court had jurisdiction to render a decree binding upon plaintiff, and he was entitled to judgment without regard to the ruling which excluded the deed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Knight v. Garden.

Detinue.

(Decided April 20, 191½. 71 South. 715.)

1. Detinue; Evidence.—Where the action was detinue for a mule, the averments that the allegations of the complaint were untrue, is a plea of the general issue, and puts in issue plaintiff's right to recover, and renders admissible, evidence negating the right of either plaintiff or defendant; hence, where the mule was claimed under a mortgage, the mortgagor could properly testify whether or not he signed the mortgage.

[Knight v. Garden.]

2. **Same; Character of Action.**—The gist of the action of detinue is detention, and although the right of possession may rest wholly on the mortgage, yet the mortgage of the property alleged to have been wrongfully detained, is not the foundation of the suit.

3. **Records; Validity; Collateral Attack.**—Where the validity of the record of a mortgage is put directly in issue by the pleading of the attacking party, the attack is direct; the attack is collateral only where there are no proper averments against the record.

4. **Detinue; Rights of Parties; Mortgage.**—Where plaintiff in detinue introduces a mortgage under which he claims, the defendant may defeat, under a plea of the general issue, such prima facie right of possession by showing an outstanding title in a third party, or proving payment, or showing that the mortgage has been rendered nugatory, or that the property was a gift, or that plaintiff is estopped to deny defendant's right of possession.

5. **Pleading; Verification; Necessity.**—The provisions of § 5332, Code 1907, are without application to a suit in detinue, where the trial is had only on a plea of the general issue.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Detinue by Rebecca Garden as administratrix against W. M. Knight. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Transferred from Court of Appeals.

FINCH & PENNINGTON, for appellant. GUNN & POWELL, for appellee.

THOMAS, J.—The action is in detinue for a mule claimed by virtue of a mortgage. The judgment entry recites that the defendant pleaded the general issue. The exact form of the plea is not disclosed by the record. The plaintiff proved that Lando Patton owned the mule in question, and that he was indebted to appellee's intestate, and that to secure this indebtedness he executed a mortgage to said intestate. The defendant, appellant, proved his purchase of the mule from H. Bonfield, who claimed it by virtue of his foreclosure of a subsequent mortgage from Lando Patton. The court's rulings on the introduction of evidence are presented for review.

(1) The Patton mortgage to plaintiff's intestate having been introduced in evidence, the defendant asked the witness: "Did you sign that mortgage, Mr. Patton?" Plaintiff objected, because the evidence sought to be elicited was "incompetent, irrelevant, immaterial, or illegal," and because there was no plea of non

[Knight v. Garden.]

est factum. The objection was sustained, and defendant duly excepted, and, as appellant, now assigns error on this ruling of the court.

The books are agreed that detention is the gist of the action of detainee.—*Walker v. Fenner, et al.*, 20 Ala. 192. The general issue in this action is non detainet.—3 Chitty's Pl. 1023; Stephens' Pl. pp. 173, 174. An averment that the allegations of the complaint are untrue is a plea of the general issue.—Code, § 5331; *Berlin Machine Works v. Ala. City Furn. Co.*, 112 Ala. 488, 20 South. 418. This plea puts in issue the right of the plaintiff to recover (*Foster v. Chamberlain*, 41 Ala. 167; *Welldon v. Witt*, 145 Ala. 612, 40 South. 126; *Lucas v. Pittman*, 94 Ala. 616, 10 South. 603; *Ingersoll-Sergeant Drill Co. v. Worthington & Co.*, 110 Ala. 322, 20 South. 61; *Grunewald v. Copeland*, 131 Ala. 345, 30 South. 878); and evidence negating the right of possession of plaintiff or of defendant is competent (*Snellgrove v. Evans*, 145 Ala. 600, 40 South. 567.)

In *Pinckard & Lay v. Bramlett*, 165 Ala. 327, 51 South. 557, it was held that proof of payment of the mortgage debt may be shown in detainee under the general issue, as tending to divest the legal title of the mortgagee to the personal property in question.—*Slaughter v. Swift*, 67 Ala. 494.

In *Green v. Sneed*, 101 Ala. 205, 208, 13 South. 277, 46 Am. St. Rep. 119, an action of detainee by a mortgagee against the mortgagor after the law day of the mortgage, it was held that, where the action is not on the original consideration for which the mortgage was executed, but is on the right of recovery of the mortgaged property, and the title asserted by the plaintiff depends upon the validity of the instrument itself, in legal contemplation the instrument which the defendant executed ceases to be his act the moment it is altered, and that the alteration may be shown. The only plea in the *Green Case*, as shown by the original record in this court, was the general issue; and under that plea proof of the alteration of the mortgage after signature was permitted to destroy the muniment of title upon which the plaintiff relied for recovery.

So in *Carlisle v. People's Bank*, 122 Ala. 446, 26 South. 115, it was held that under the general issue testimony may be introduced to vary or explain the terms of the mortgage on which the plaintiff relies for title, and to defeat the recovery in detainee.—*Foster v. Chamberlain & Co.*, 41 Ala. 167.

[Knight v. Garden.]

In *Hoobler v. International Harvester Co., etc.*, 185 Ala. 538, 537, 64 South. 567, 569, Mr. Justice SAYRE said: "The matters involved in the proper pleas to which we have alluded went to plaintiff's title, and might have been proved under the general issue (*Carlisle v. People's Bank*, 122 Ala. 446, 26 South. 115), filed after the rulings on pleas 3, 4, and 8, but the court followed up its rulings on these pleas by excluding from the jury evidence of the fact upon which the pleas were based, evidence tending to disprove the title by which plaintiff claimed, and these rulings were erroneous."

(2, 4) In the action of detinue the mortgage in evidence was not the foundation of the suit, although the plaintiff's title or right to the possession of the personalty may rest solely on the mortgage. The suit was for specific property, and the gist of the action was detention. The defendant was not apprised by the complaint of what right of possession the plaintiff would show. When the validity of a record attacked is put directly in issue by the pleadings of the party attacking it by proper averments, the attack is direct, and not collateral; but, when there are no proper averments attacking the record, although its validity is drawn into the issue of the case, the attack is collateral.—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537; *Dormitzer v. Ger. Savings & L. Soc.*, 23 Wash. 132, 62 Pac. 862. When the mortgage is introduced in evidence as evidence of plaintiff's right of possession, under defendant's plea of the general issue defendant may defeat this prima facie right of possession by showing an outstanding title in a third person (*Wright v. Bush*, 165 Ala. 320, 51 South. 635), or by proving payment (*Pinckard v. Bramlett*, 165 Ala. 327, 51 South. 557), or by showing that the mortgage relied on by plaintiff has been rendered nugatory (*Birmingham Co. v. Gillespie*, 163 Ala. 408, 50 South. 1032). So also may it be shown, under the general issue, that the plaintiff has given the defendant the property (1 Tidd's Pr. 650-653), or that the plaintiff has not the unqualified right of possession in its present form (*Seals v. Edmondson*, 73 Ala. 295, 49 Am. Rep. 51), or the right of the entire possession (*Graham v. Myers*, 74 Ala. 432), or is estopped to deny the defendant's right of possession (*Traum v. Keiffer*, 31 Ala. 144).

(5) The rule of pleading declared in section 5332 of the Code has no application to trover and detinue. Under the companion section (3967), declaring a rule of evidence in certain cases, it

[Headley v. Harris.]

has been held that a suit in trover for the conversion of a mule, a mortgage collateral to the suit, or inter alios is not within the provision of the statute.—*Askew Bros. v. Steiner & Lobman*, 76 Ala. 218. By analogy the words “any instrument in writing, the foundation of the suit,” found in section 5332 of the Code, have no application to actions in detinue. We do not mean to say that the rule would be different in a case where there was a suggestion of the mortgage debt under the statutes (Code, § 3789 et seq.) It is sufficient to say that no such suggestion was made in this case, and that the trial was had only on the plea of the general issue.

No good reason exists why, under the plea of the general issue in detinue, the defendant may not deny or impeach the execution of the plaintiff's mortgage introduced in evidence and relied on for his title and for his right of possession.

For the refusal of the trial court to allow defendant, under his plea of the general issue, to deny the execution of the chattel mortgage on which plaintiff rested his right of recovery, the judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Headley v. Harris.

Detinue.

(Decided April 20, 1916. 71 South. 695.)

1. Trial; Exclamation of Counsel.—Where defendant's chief witness was being examined, and, immediately following his denial of a fact which seems to have been overwhelmingly established, the exclamation of plaintiff's counsel: “Look out, now, hold on! watch how you testify! somebody may be indicted for perjury!” was improper.

2. Appeal and Error; Harmless Error; Conduct of Counsel.—Where witness's testimony was in no wise affected thereby, and the witness retracted nothing, but pointedly supported every fact relied upon by defendant, improper exclamations of counsel was not prejudicial.

3. Same; Review; Assignment.—Where the objection invokes no ruling of the court, it affords no basis for an assignment of error with respect thereto.

APPEAL from Hale Law and Equity Court.
Heard before Hon. CHARLES E. WALLER.

[Headley v. Harris.]

Detinue by O. W. Harris against J. A. Headley. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from the Court of Appeals.

J. T. DENSON, for appellant. THOMAS E. KNIGHT, for appellee.

SOMERVILLE, J.—A careful review of the evidence in this case leads to the conclusion that the findings and judgment of the trial court, sitting without a jury, are well founded, and ought to be affirmed.

(1, 2) While one of the defendant's chief witnesses was being examined by counsel, and immediately following his statement in denial of a fact which seems to have been overwhelmingly established by the other witnesses, counsel for plaintiff exclaimed: "Look out now! Hold on! Watch how you testify! Somebody may be indicted for perjury?"

The bill of exceptions recites that: "Defendant's counsel objected to the remarks of the attorney for plaintiff, and the court directed plaintiff's counsel to come to order, and then directed defendant's attorney to proceed with the examination of the witness."

The interjection of this remark by counsel was not proper, and it may be, as argued for appellant, that it might ordinarily be suspected of prejudicial results, especially in view of the fact that plaintiff's counsel is the prosecuting officer of the court, and would have peculiar facilities for securing the suggested indictment. However, an inspection of this witness' testimony shows that it was in no wise affected by the objectionable statement, since he retracted nothing, and pointedly supported every contention of fact relied upon by defendant, who was his brother.

(3) Moreover, the objection, as interposed, invoked no ruling of the court, and there is no basis for an assignment of error with respect thereto.—*B. R., L. & P. Co. v. Gonzalez*, 183 Ala. 273, 61 South. 80, Ann. Cas. 1916A, 543.

Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

[Lee, et al. v. Lee.]

Lee, et al. v. Lee.

Ejectment.

(Decided October 21, 1915. Rehearing denied June 1, 1916.
72 South. 24.)

1. **Landlord and Tenant; Adverse Possession; Statutory Notice.**—Adverse possession does not run in favor of a tenant at will under the owner until the tenant files a declaration with the probate judge asserting such adverse possession, as required by § 1541, Code 1896.

2. **Adverse Possession; Evidence.**—One claiming by adverse possession cannot introduce letters from the owner merely giving permission to occupy the land when there has been no disavowal of the owner's title.

3. **Same; Duration; Tacking.**—Possession that was adverse under the statutory provision of the Code of 1896, may be tacked to a possession adverse under the Code of 1907.

4. **Same.**—If defendant's possession was adverse during and under the period covered by the Code of 1907, and had no adverse possession under the Code of 1896, the two could not be tacked to make the holding complete.

5. **Same; Hostile Character; Co-Tenancy.**—Possession of land by the son of a deceased owner is presumably for the benefit of the estate and the co-heirs, and is not adverse to them until some hostile act occurs.

6. **Executors and Administrators; Distribution of Estate; Collateral Attack.**—An order of the probate court for the sale of a decedent's land for distribution is not subject to collateral attack by an heir who was not a party to the probate proceedings.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Ejectment by W. W. Lee against B. L. Lee with notice to D. L. Watson as landlord. Judgment for plaintiffs and defendants appeal. Affirmed.

W. O. MULKEY, for appellant. C. D. CARMICHAEL, for appellee.

ANDERSON, C. J.—The proof in this case was not sufficient to relieve Alex Lee from filing a declaration under section 1541 of the Code of 1896, in order to set up adverse possession. While he had negotiated with Hinson for the purchase of the land, the proof shows that the land was bought by Evan Lee, the reputed father of Alex, to whom a deed was made by Hinson, and that

[Lee, et al. v. Lee.]

Alex went into possession, not under color of title or claim of bona fide purchase or through a claim of inheritance, but as the tenant at will and under a permissive possession from Evan Lee. Therefore the possession of Alex Lee was not adverse to Evan Lee, his heirs or privies under the Code of 1896. Nor was there reversible error in sustaining the plaintiff's objection to the contents of the letter from Evan Lee to Hinson when the said Hinson put Alex into possession as it merely showed a permissive possession in Alex from Evan Lee and which could not become hostile until there was a clear disclaimer and disavowal of the title of Evan Lee and his heirs and privies by the said Alex Lee. —*Collins v. Johnson*, 57 Ala. 304; *Potts v. Coleman*, 67 Ala. 221; 7 Mayf. Dig. p. 15. Nor did the statement of the contents of the letter tend to show that Alex was to be given the land or placed in the position of any one other than a permissive holder under Evan Lee.

Had Alex Lee shown a compliance with the Code of 1896, and an adverse possession thereunder, he could tack that period to an adverse possession during the period covered by the Code of 1907, and if the two existed for the requisite period his adverse possession would be established; but if he had no adverse possession during the period covered by the Code of 1896, said period could not be tacked to the period covered by the Code of 1907, though he may have been an adverse holder for the last period. Not having an adverse possession under the Code of 1896, and not being able to tack the period covered by said Code to the possession under the Code of 1907, and the period under the Code of 1907, being less than ten years, the title of the plaintiff was not ousted by adverse possession.

The appellants also insist that Alex Lee was excepted from the statute as to the declaration and registration of his claim or color of title, because he went into possession of, or held, the land by descent. In other words, that he was a lawful heir of Evan Lee, the owner of the land. It may be conceded that there was some proof tending to establish a common-law marriage between Evan Lee and the mother of Alex, a question we need not and do not decide; yet if such was the case the said Alex Lee did not hold adversely to the estate or the other heirs of said Evan Lee until the proof showed some hostile act or conduct which would overcome the legal presumption that he was holding for the benefit of the estate or of his cotenants. The only proof to indicate

[Qualls v. Qualls.]

such action or conduct on the part of Alex was that he mortgaged the land to Watson a few years before selling it to him; but the record fails to show that hostile assertion or claim was made ten years before the commencement of the suit.

There is no merit in the claim of title through Alex Lee as to an undivided interest by inheritance from Evan Lee, independent of the claim of adverse possession, as the sale of the land by the probate court for distribution cut off the right to impeach the same, in this action, conceding that Alex was a legitimate child of Evan and was not a party to the probate proceedings.—*Lyons v. Hamner*, 84 Ala. 197, 4 South. 26, 5 Am. St. Rep. 363.

The trial court did not err in giving the general charge for the plaintiff, and the judgment is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

Qualls v. Qualls.

Ejectment.

(Decided May 18, 1916. 72 South. 76.)

1. **Witnesses; Impeachment; Predicate.**—Where defendant relied upon a deed from plaintiff which plaintiff claimed was forged, it was proper as laying a predicate for impeachment for defendant to inquire of plaintiff if she had not told a third person that she had deeded the land to defendant.

2. **Appeal and Error; Harmless Error; Evidence.**—Any error in not permitting the question, was harmless where the expected answer thereto was subsequently allowed in evidence.

3. **Evidence; Opinion; Handwriting.**—Where the action was ejectment and was defended on the theory that plaintiff had executed to defendant a deed to the land, which the plaintiff asserted was forged, it was not error to refuse to allow defendant to prove the genuineness of the signature to other papers by a witness to the deed, for the purpose of laying a predicate for the introduction of expert testimony, it not appearing that the other papers were material to the controversy, or that they were in evidence.

4. **Acknowledgment; Effect; Conclusiveness.**—The question of whether an instrument is valid as respects the competency of the officer taking the acknowledgment must be raised by direct proceedings and not by collateral attack.

5. **Same.**—Where the officer taking the acknowledgment is without jurisdiction, there being no examination of the reputed grantor, and no ac-

[Qualls v. Qualls.]

knowledge before the officer, his certificate is void, and may be attacked collaterally.

6. Same.—To give an acknowledging officer jurisdiction of the grantor, the mere casual presence of the grantor and the possession of an instrument purporting to have been signed by such grantor is not sufficient, as there must be a personal acknowledgment in some form.

7. Same; Impeachment.—It is not essential to the impeachment of a certificate of acknowledgment for fraud or duress practiced on the grantor, that the certifying officer should have participated therein.

8. Same; Evidence.—Where defendant set up a deed executed by the plaintiff to defendant, and claimed by plaintiff to have been forged, no right of bona fide purchaser for value being involved, the testimony of the acknowledging officer that he fixed his seal and certificate in the absence of the reputed grantor, was admissible.

APPEAL from Covington Circuit Court.

Heard before Hon. H. A. PEARCE.

Ejectment by Emily Qualls against J. M. Qualls. From a judgment for plaintiff defendant appeals. Affirmed.

BALDWIN & MURPHY, for appellant. JONES & POWELL, for appellee.

THOMAS, J.—This action of ejectment was brought by Emily Qualls for the recovery of the lands described in the complaint.

The plaintiff as a witness testified that she had been living on the land in question since she received the patent thereto; that defendant J. M. (Bunk) Qualls also had been living on the land about 16 years; that there was a clearing and considerable improvements on the land, some of which were made by the defendant; that she “did not execute a deed to Mr. Qualls to this land;” that she did not execute any such deed thereto before Justice of the Peace Reeves or Justice of the Peace Windham; that she went to Windham to get him to fix up her will; that she signed a timber right deed when Mr. W. O. Searcy and Mr. T. J. Pearce came to her place; that she could not read; that she knew Mrs. Cauley.

(1, 2) Defendant then asked the witness the question: “Did you tell her at Mrs. Strickland’s home, six or seven years ago possibly, no one else except you and Mrs. Cauley being present, that you had made Bunk a deed to this land?”

The refusal of the court (on objection of plaintiff) to allow the witness to answer the question is assigned as error. The

[Qualls v. Qualls.]

tendency of the evidence sought to be elicited was to impeach the statement of the witness that she did not execute a deed to the land in question to Mr. Qualls. The predicate sought to be laid was within the accepted rule.—*McDaniel v. State*, 166 Ala. 7, 52 South. 400; *Price v. State*, 117 Ala. 113, 23 South. 691; *Hester v. State*, 103 Ala. 83, 88, 15 South. 857. It is clear, however, that no prejudicial error intervened; for Mrs. Cauley was permitted to contradict the statement for which the predicate was sought to be laid:

(3) There was no error in refusing to allow the defendant to prove the genuineness of the signature of the witness T. J. Pearce to other papers than the deed in dispute for the purpose of laying a predicate for the introduction of expert testimony. It was not shown that the papers exhibited to witness were material to the controversy, and not shown they were in evidence. At the time of this trial comparison of handwritings might not be made except under the conditions pointed out in *Kirksey v. Kirksey*, 41 Ala. 626; *Curtis v. State*, 118 Ala. 125, 24 South. 111; *Griffin v. Working Women's Home Ass'n*, 151 Ala. 597, 602, 44 South. 605.

The defendant introduced in evidence a deed to J. M. Qualls, dated July 1, 1905, conveying the land in question, reciting a consideration of \$300, and purporting to be signed by plaintiff, Emily Qualls, by her mark, and attested by W. O. Searcy and T. J. Pearce, and bearing a certificate of acknowledgment of said date, by W. O. Searcy, justice of the peace.

The plaintiff called as a witness W. O. Searcy, who testified that he knew the parties; that he went out to Bunk Qualls' to take an acknowledgment about the 1st of July, 1905. He was then handed the above-described deed, and on inspection replied to questions by plaintiff's counsel: "I signed that acknowledgment. That is my signature as a witness, and I signed as a witness."

Plaintiff's counsel then asked: "Well, now, did Mrs. Qualls make her mark to that paper there (referring to the deed in question)?"

Counsel for defendant objected to the question on the grounds that the officer who took the acknowledgment was not a competent witness to contradict or impeach the certificate. To the overruling of this objection the defendant excepted, and defendant now assigns the ruling as error. The witness answered:

[Qualls v. Qualls.]

"No, sir; not before me, she did not, she did not make her mark to that paper before me that day or at any other time."

Here plaintiff, over defendant's objection and exception, asked: "Well, at whose instance did you write that deed?"

And the answer was: "J. M. Qualls got me to write that deed, the defendant. He got me to write it on the morning of the day that it was dated, I believe. He got me to do this in my office at Opp. He came up there to me. I wrote the deed there in my office. I was in my office when I signed my name there as a witness. I then carried that deed out to Bunk Qualls. I saw Mrs. Emily Qualls there. There was something said about her signing this deed. * * * Bunk asked her, * * * She said she would not sign it. I think the deed was left lying there on the table, or machine."

In many jurisdictions it is held that the officer is not a competent witness to contradict or impeach his certificate of acknowledgment to a conveyance.—*Stone v. Montgomery*, 35 Miss. 83; *Greene v. Godfrey*, 44 Me. 25; *Cent. Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *McKellar v. Peck*, 39 Tex. 381; *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. 230; *Woolbridge v. Woolbridge*, 69 W. Va. 554, 72 S. E. 654, Ann. Cas. 1912B, 653; 1 Dev. on Real Estate (Ed Ed.) § 532; 1 Corpus Juris, p. 895, § 282.

In *Hailey v. Glenn*, 10 Idaho 224, 77 Pac. 623, 109 Am. St. Rep. 204, the court says: "No notary should be allowed to come into court upon the foreclosure of a mortgage and give testimony impeaching his certificate to the mortgage which is being foreclosed. In the first place, the certificate is made at the time of the acknowledgment, and is the solemn declaration of the officer in his official capacity, under his hand and seal, as to the truth and accuracy of the statements it contains, and it is more likely to be true and correct than the memory of the person in years afterward. * * * After persons have relied upon the faith and correctness of his official statement and invested their money, and rights have grown up thereunder, the person who acted as such official and made such certificate should not be heard in a court of justice disputing its correctness."

(4, 5) The question of the validity vel non of the instrument, as respects the competency of the officer taking the acknowledgment, must be raised in a direct, and not a collateral, attack.—*Vizard v. Robinson*, 181 Ala. 349, 61 South. 959; *Monroe v. Arthur*, 126 Ala. 362, 28 South. 476, 85 Am. St. Rep. 36; *Hayes*

[Qualls v. Qualls.]

v. B. & L. Ass'n, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216. Where, however, the officer was without jurisdiction, in that there was no examination of the reputed grantor, and no acknowledgment before the officer, then such a certificate is void because not authorized by law to be made, and it may be attacked collaterally, as is now sought to be done.—*Chatta. N. B. & L. Ass'n v. Vaught*, 143 Ala. 389, 39 South. 215; *Parrish v. Russell*, 172 Ala. 1, 55 South. 140; *Gilley, et al. v. Denman*, 185 Ala. 561, 64 South. 97.

(6) It is essential, for the certifying officer to have acquired jurisdiction of the grantor, to have before him at the time the grantor and the instrument to be acknowledged, and, as such officer, to have entered upon the exercise of his jurisdiction. The mere casual presence of the reputed grantor and the possession of an instrument purporting to have been signed are not sufficient to confer jurisdiction. There must be an acknowledgment in some form by the grantor of the instrument signed.—*Orendorff v. Suit*, 167 Ala. 563, 52 South. 744; *Chatta. N. B. & L. Ass'n v. Vaught, supra*; *Parrish v. Russell, supra*; *Barnett, et al. v. Proskauer & Co.*, 62 Ala. 486. And want of jurisdiction may be shown by parol.—*N. E. M. S. Co. v. Payne*, 107 Ala. 578, 18 South. 164; *E. A. L. M. Co. v. Peoples*, 102 Ala. 241, 14 South. 656.

(7) It is not essential to the impeachment of a certificate of acknowledgment that the certifying officer should have participated in the fraud or duress practiced on the grantor.—1 Dev. on Real Estate (3d Ed.) § 532, and authorities; *Gilley, et al. v. Denman, supra*.

In the instant case no right of a bona fide purchaser for value without notice is challenged. The charge of forgery of plaintiff's execution of the warrant on which the defendant relies for title is made, and that the same was participated in by the defendant, and that plaintiff never, in fact, executed the conveyance or acknowledged the same before the officer certifying thereto.

In *Parrish v. Russell, supra*, the court said: "The presence of the officer for the purpose stated, the presence of the instruments themselves, the presence of the grantors for said purposes, and the signing of the papers then and there by them, the notary's certificate of the acknowledgment by the husband, and the separate acknowledgment of the wife are not open to impeachment by parol evidence; no fraud or duress being shown."

[Qualls v. Qualls.]

The rule here stated, following what was laid down in *Grider v. Mortgage Co.*, 99 Ala. 281, 12 South. 775; 42 Am. St. Rep. 58, has never been departed from in this court."

In the case of *Grider v. A. F. L. M. Co.*, 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58, it is said: "We know the absolute and implied faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance upon them; yet, on the other hand, we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another. * * * Upon due consideration we are of opinion that the better rule, and the one sustained by the weight of authority is, that when there has been no appearance before the officer, and no acknowledgment at all made, it may be shown in disproof of the officer's certificate, even against bona fide mortgagees and purchasers."

In *Cheney, Trustee, v. Nathan*, 110 Ala. 254, 265, 20 South. 99, 102 (55 Am. St. Rep. 26) facts very similar to those now presented were before the court, and the court there said: "The paper was not signed in the presence of the notary. It was never in the presence of the grantor and the notary after it was signed. When the notary had it and executed his certificate of acknowledgment, there was nothing to acknowledge, there was no signature, nor was there any signature at any time while it was in his possession. Treating his powers and acts as judicial, they were lacking in one essential of jurisdiction. There was no signature of any kind, genuine or otherwise before him. He had to do officially only with signatures."

The question of the right of the notary purporting to have taken the acknowledgment to testify was not raised in the *Nathan Case*.

In *Davis v. Monroe*, 187 Pa. 212, 216, 41 Atl. 44, 45 (67 Am. St. Rep. 581), it is held that public policy would prevent an officer taking an acknowledgment to impeach his certificate, when the rights of subsequent purchasers or parties dealing with the land on the credit of his official certificate have attached thereto,

[Qualls v. Qualls.]

but that it cannot be applied between the original parties or their privies.

"That a justice of the peace knowing of a fraud took an acknowledgment of a deed by which the fraud was to be carried out, and said nothing at the time to the parties defrauded, is a circumstance that may effect his credibility with the jury, but does not make him an incompetent witness in a contest between the original parties."

The right of the officer to falsify his own official certificate is stated in *Winn v. Itzel*, 125 Wis. 19, 26, 103 N. W. 220, 222, as follows:

"In other jurisdictions authorities are quite evenly divided on the question.—1 Am. & Eng. Ency. of Law (2d Ed.) 562, notes 1, 2; 1 Cyc. 626, notes 46, 47. The authorities which hold such testimony inadmissible do so upon the ground that it is against public policy to allow a public officer to undermine by oral testimony his official certificate, upon the integrity of which rights of third persons may depend, and there is force in the argument. Certainly such testimony is thoroughly impeached by the witness himself. It might probably be termed a 'gross impropriety,' as was said by the court in *Loughney v. Loughney*, 87 Wis. 92 [58 N. W. 250], where the scrivener and witness to a will, who was named as executor therein and presented the same for probate, testified that the testator lacked mental capacity to make a will. Still we have not been able to convince ourselves that such testimony should be entirely excluded. It is not likely that it will be frequently offered. * * * We are inclined to hold the testimony admissible, but we also hold that, in the absence of a satisfactory explanation by the officer showing that the official certificate, though mistaken, was honestly made at the time (and there was no such testimony here), such testimony should receive little weight.—*Wilson v. South Park Com'rs*, 70 Ill. 46."

A fundamental question is raised by Mr. Justice Campbell in *Camp v. Carpenter*, 52 Mich. 375, 379, 18 N. W. 113, 114, as follows: "There is no rule which could lawfully make any officer's certificate of acknowledgment conclusive evidence of the identity of persons or of the execution of a conveyance which would not have the effect of depriving a person of his property without his own act or fault. Such a transfer would very clearly be beyond legislative authority. The question must necessarily

[Qualls v. Qualls.]

be open to proof whether the instrument relied on is genuine. In *Hourtienne v. Schnoor*, 33 Mich. 274, and *Johnson v. Van Velsor*, 43 Mich. 219 [5 N. W. 265], it was intimated that such official action must, where had before an officer knowing the parties, receive great consideration. In both of those cases the officer swore to such facts as raised a distinct issue of veracity, and in both his testimony was accompanied by strong corroboration. In the present case, when the notary swore he did not know the person whom he certified he knew, he deprived his certificate of all of the foundation on which the law allows the presumption to be raised, and the subscribing witness, who testified to his own ignorance, destroyed also the presumptions that in some cases attend the action of such witnesses in the absence of suspicion. It would be very absurd to allow a certificate such weight as is claimed for it here, when the notary himself contradicts his own statements, and shows its want of truth. It is not a very satisfactory state of things when a forgery can gain even presumptive credit from the action of an officer who has certified without foundation for his action."

That this doctrine was announced by Judge Campbell during the incumbency of Justices Cooley and Sherwood gives it added weight as authority. To like effect has been the holding in Missouri, Iowa, Nebraska, and Kentucky.—*Pereau v. Frederick*, 17 Neb. 117, 22 N. W. 235; *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804; *Mays v. Pryce*, 95 Mo. 603, 8 S. W. 731; *Belo v. Mayes*, 79 Mo. 67; *Tatum v. Goforth*, 9 Iowa 247; *Garth v. Fort*, 15 Lea (Tenn.) 683.

We have found no case by our court, where the want of jurisdiction was shown by the individual who usurped official authority. It has, however been declared that the official taking the acknowledgment may testify to support the certificate.—*Smith v. McGuire*, 67 Ala. 34, 39; *Giddens v. Bolling*, 99 Ala. 319, 323, 13 South. 511. This, however, is not decisive of the question before us.

(8) Public policy would not forbid, and no good reason would deny, the testimony of the individual who, acting without having acquired jurisdiction, has affixed his seal of office, and attached his certificate of acknowledgment to a conveyance, in a case where no right of a bona fide purchaser for value without notice is challenged.

[Qualls v. Qualls.]

In the instant case, with no actual fraudulent intent, the official exceeded his authority in affixing his seal of office and his certificate of acknowledgment to the deed in the absence of the reputed grantor. Thereafter he went to her home with the conveyance to secure her signature thereto and her acknowledgment thereof before him as a notary public; and on her refusal to sign the instrument he left the paper lying "on the table or machine" in the house where plaintiff and defendant were. Thus there was no execution of the conveyance, nor acquisition of jurisdiction, by the official, of Mrs. Qualls. The deed was prepared and carried by the notary to the home of the plaintiff for her signature, at the instance and request of the defendant. When it was discovered that the deed was later filed for record, the notary appearing on the face of the deed to have witnessed it and taken the acknowledgment repudiated its genuineness to the defendant. Neither public policy nor other rule of our court would prevent the witness Searcy in a controversy between the parties to the purported deed to deny its execution to explain the presence of his affixed seal of office and certificate of acknowledgment, and to state the true facts, in a court of justice, when such a reputed conveyance is collaterally attacked.

The case of *American Freehold L. M. Co. v. Thornton*, 108 Ala. 258, 19 South. 529, 54 Am. St. Rep. 148, cited by appellant, does not conflict with the view we have expressed. Mr. Justice McCLELLAN says that, given the "presence of the officer for the purpose stated, the presence of the instruments themselves, the presence of the grantors for said purposes, and the signing of the papers then and there by them, the notary's certificates of acknowledgment of the husband and the separate acknowledgment of the wife are not open to impeachment by parol evidence; no fraud or duress having been shown."

The *Thornton Case* is recently cited, with many other authorities, in *Vizard v. Robinson*, *supra*, in support of the statement that an efficacious acknowledgment "imports a verity against which none can * * * complain unless it is for duress or fraud." The agreed statement of facts set out in the *Vizard Case* expressly states that "Jones took the acknowledgment of the vendors, that they executed said deed," etc.

The judgment is affirmed.
Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

[Landers v. Hayes.]

Landers v. Hayes.**Ejectment.**

(Decided May 18, 1916. 72 South. 106.)

1. **Descent and Distribution; Homestead; Widow.**—Where the husband owned at the time of his death a single tract of land which did not exceed in value \$2,000, the only child left by him not being a minor, the title to the land vested absolutely in the widow under § 2098, Code 1896.

2. **Evidence; Hearsay; Pedigree.**—Hearsay evidence is always admissible to prove pedigree, that term embracing not only questions of descent and relationship, but also the particular facts of birth, marriage and death, and the time when these events may have happened.

3. **Same.**—Such declarations made by members of a family, admissible on matters of pedigree, whether in writing or orally, should be confined to some members of the family, as distinguished from a general rumor or neighborhood reputation.

4. **Same; Predicate.**—As a predicate for the admission of hearsay evidence of members of a family as to matters of pedigree, it must appear that the declarant had died since making his declaration.

5. **Same; Age.**—Age may be proven by the testimony of a person whose age is in question, and the fact that his knowledge was derived from his parents or from family reputation, does not render his testimony inadmissible, such being primary and not secondary evidence.

6. **Same.**—Where the age of plaintiff's deceased father was a material issue, proof of the statement made by the father as to his age, all being made before suit brought, was admissible.

7. **Same.**—Declarations of a person as to his age, affecting favorably his own interest, or that of his estate in an existing controversy, are inadmissible, although he has since died, not under the hearsay rule, but because such declarations are self serving.

8. **Witnesses; Disqualification; Declaration of Decedent.**—Where the agent of plaintiff's deceased father was material, the widow was competent under the statute to prove statements made by him relative to his age if her interest is not opposed to the interest of his estate.

9. **Evidence; Hearsay; Age.**—Where the age of plaintiff's father was a material issue, the fixing of the date of the father's marriage and the date of the death of the father's father was admissible in connection with statements made by the father to his wife, as to his age at the time of these events.

10. **Same; Opinion; Value.**—Value may be proven by a non expert, and the opinion of a witness who knew the land concerning its rental value, was not objectionable.

11. **Trial; Discretion of Court; Reading Evidence.**—It is discretionary with the trial court whether it will permit the official stenographer to read excerpts from the evidence to the jury.

[Landers v. Hayes.]

12. **Descent and Distribution; Exemptions; Widow.**—The value of a decedent's land as related to the exemption of the widow should have been computed upon so much of the land as decedent owned, and not the entire tract.

13. **Appeal and Error; Harmless Error; Instructions.**—Where it was claimed that upon the death of plaintiff's father, the land vested in the widow because worth less than \$2,000, and consequently did not descend to plaintiff, error in a charge intended to exclude any exemption to the widow, if the land was worth over \$2,000, the charge basing the value upon the entire tract, and not upon so much of the land as the father might have owned, was harmless; the proof failing to show that whatever land the father got was his exemption at the time of his death, and that he lived on it, or owned less than the exemption so as to vest title in his widow and minor child.

14. **Dower; Sale by Widow.**—Plaintiff heir was not precluded from recovery in ejectment on the theory that defendant held under a conveyance from plaintiff's mother who had a dowerable interest in the land which was assigned by her deed to defendant.

15. **Charge of Court; Covered by Those Given.**—It is not error to refuse charges substantially covered by written charges given.

16. **Ejectment; Burden of Proof.**—A plaintiff in ejectment does not have to prove title beyond a reasonable doubt.

17. **Same; Prima Facie Case.**—In ejectment, proof by plaintiff that she was the only child of decedent who was the only child and sole heir of the admitted owner of the land, and who was dead, made a prima facie case; and where defendant relied upon a break in the transmission of the title by descent, that is, that it was exempt, and not subject to the law of descent and distribution, the burden was on defendant to show the exception to the rule.

18. **Same; Rental Value; Evidence.**—In ejectment the jury may look to the proof as to the character and value of the land in determining its rental value, there being direct evidence also as to its rental value.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Ejectment by Lillian Hayes, pro ami, against M. R. Landors. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts sufficiently appear.

The following charge was given for plaintiff:

(1) If you are satisfied reasonably from the evidence that at the death of Noah Hayes his son, James, was not 21 years old, and if you are further satisfied reasonably from the evidence that the land in question was worth more than \$2,000 at the time of the death of James Hayes on August 31, 1907, then your verdict should be in favor of plaintiff for an undivided one-half interest in the lands sued for, together with the value of the rental during the time the defendant had been wrongfully in possession.

The following charges were refused to defendant:

[Landers v. Hayes.]

(B) The burden of showing title to land in plaintiff is upon plaintiff, and, if plaintiff has left your minds in doubt as to any material fact upon which her claim of title rests, and that doubt is a reasonable doubt, your verdict should be in favor of defendant.

(D) There is no evidence before you as to who changed the monument at the grave of James Hayes, or for what purpose said monument was changed, if it was changed.

(E) The burden rests upon plaintiff to reasonably satisfy the jury that James Hayes was not of age when his father died, or the lands that were left by Noah Hayes at the time of his death were worth more than \$2,000.

(F) The burden rests upon plaintiff to reasonably prove that the lands were not exempt to the widow, and did not vest in her upon the death of Noah Hayes.

E. O. McCORD, and THOMAS E. ORR, for appellant. STREET, ISBELL & BRADFORD, for appellee.

ANDERSON, C. J.—(1) This was an action of ejectment, and the plaintiff proved a prima facie title to the land by descent; that is, that she was the only child of James Hayes, deceased, and that James was the only child and sole heir of the admitted owner of the land, Noah Hayes, deceased. The defendant attempted to overcome the plaintiff's claim by inheritance, under the contention that upon the death of the said Noah Hayes his widow was entitled to the land in question as exempt to her, and, as the said Noah owned no other land, and as this land did not exceed in value \$2,000, the title, under the then existing statute (Code 1896, § 2098), vested absolutely in said widow, as the only child left by the said Noah Hayes was not a minor at the time of the death of his father. If these facts were true, then this plaintiff should not have recovered, but it seems that the jury found that the land did not exceed the exemption in area and value, and was therefore exempt, but they must of necessity have found that James Hayes was a minor at the time his father, Noah, died, and took a half interest in the exemption with his mother, as a verdict was returned for this plaintiff for an undivided one-half interest in the land. The result is that the pivotal point in the case is the minority vel non of James Hayes when his father died, and which involves the

[Landers v. Hayes.]

date of the birth of the said James as well as the exact time of the death of his father, Noah Hayes.

(2-8) The rule seems to be that hearsay evidence is always admissible to prove pedigree, and this term embraces not only questions of descent and relationship, but also the particular facts of birth, marriage, and death and the time when these events may have happened. Such evidence is held admissible not only from the extreme difficulty of producing any better, but is resorted to upon the ground of the interest of the declarants in all such matters of family relationship and connection. These declarations, however, whether in writing or by word of mouth, should be confined to some members of the family as distinguished from a general rumor or neighborhood reputation, and as a predicate therefor it must appear that the declarant has since died.—*Cherry v. State*, 68 Ala. 29; *White v. Strother*, 11 Ala. 720; *Elder v. State*, 123 Ala. 35, 26 South. 213; *Rogers v. De Bardeleben*, 97 Ala. 154, 12 South. 81. Age may be proved by the testimony of the person whose age is in question, and the fact that his knowledge is derived from statements of his parents or from family reputation does not render the testimony inadmissible. The statement of a party as to his own age is deemed primary, and not secondary, evidence.—*Cherry's Case*, *supra*. While the books sanction the rule that one's age can be proved by the declarations of a member of his family since deceased, we find no case which holds that the age of a person since deceased can be proved by declarations made by him in life, nor do we find a case holding that such declarations are not admissible. The case more nearly bearing upon the question is the *Rogers Case*, *supra*, wherein the court, in stating the ruling as to declarations and relationship, authorizes evidence of the "acts" and "conduct" of the person ("whose pedigree or age is the subject of inquiry"). If a person can testify to his own age, we are at a loss to see why his declarations to others as to his age before his death should not be admitted after his death. It is held that proof of the declarations of any deceased member of his family are admissible; yet next to the parents the person himself is more apt to have his own age more accurately fixed in his mind than it would be in the mind of some collateral member of his family. Circumstances could often arise where the only reasonable way to establish the age of a deceased person would be by entries made by him during his life or declarations that he may have made during life to

[Landers v. Hayes.]

his wife and children, friends and neighbors as to when he was born, etc. Especially would this be true as to men who settle in a new country, but brought with them no family record as to birth, yet who had stated their age continually and consistently in various and sundry ways for an entire lifetime, and it would be absurd to hold that proof of these facts could not be made, and that resort must be had to the community where he was born years ago in some distant state or country. We do not think that the trial court erred in letting in proof of the statements of James Hayes, deceased, as to his age, as they were all made before this suit was brought. We do not mean to hold that the declarations of a person as to his age affecting favorably his own interest, or that of his estate, in a controversy then existing, would be admissible although he may have since died, but it would be rejected upon the theory of self-serving instead of hearsay evidence. The declarations in question, however, were made before this suit was brought or the controversy arose between these parties. It is suggested that the widow of James Hayes was incompetent, under the statute, to prove statements made by him. In order for her to have been incompetent her interest must have been opposed to the interest of the estate of the deceased. If such was the case, she was called to the stand by the party to whose interest she was opposed.

(9) The fixing of the date of marriage with James and the date of the death of Noah Hayes was admissible in connection with the statements made by James to his wife as to his age at the time of these events, and tended to show how old he claimed to be.

(10) Value can be proved by non-expert witnesses, and Mrs. Adams knew the land and what she said about the rental value of the same was merely an opinion, and was not objectionable.

(11) The action of the trial court in permitting the stenographer to read excerpts from the evidence to the jury before it retired was discretionary.

(12-14) Charge 1, given at the request of the plaintiff, was evidently intended to exclude any exemption to James Hayes' widow if the land was worth over \$2,000 at the time of the death of said James, and it was erroneous; for the value should have been based upon so much of the land as James may have owned, and not the entire tract. But the giving of this charge was error without injury, as the proof did not show that whatever

[Landers v. Hayes.]

land James got was his exemption at the time of his death, neither that he lived on it or owned less than the exemption so as to vest the title to his interest in the land in question in his widow and child. Said charge was not erroneous as to rent, as the defendant did not show that the wife held or claimed the land as dower, and, if the plaintiff was entitled to recover, she was entitled to rents also. Nor was the heir precluded from a recovery upon the theory that the defendant held a conveyance from the widow of James Hayes, who had a dowerable interest in the land, and which was assigned by her deed. This might be an equitable defense, but is not good at law to an action by the heir to recover the land.—*Reeves v. Brooks*, 80 Ala. 26.

(15) Defendant got the full benefit of refused charge A in his written charges that were given.

(16) Charge B, refused the defendant, required too high a degree of proof by the plaintiff; she did not have to prove her title beyond a reasonable doubt.

Charge C, refused the defendant, was fully covered by his given charges.

Charge D, refused the defendant, was bad.

Charges E and F, refused the defendant, are faulty.

(17) As stated in the first part of this opinion, proof of the ownership of the land by the ancestor and that plaintiff was his sole heir made out a prima facie case, and, if the defendant relied upon a break in the transmission of the title by descent—that is, that it was exempt and not subject to the law of descents and distributions—the burden was upon him to show the exception to the rule.—21 Cyc. 487.

(18) The trial court did not commit reversible error in refusing the new trial, as there was no reversible error upon the main trial, and we are not persuaded that the verdict of the jury was contrary to the weight of evidence either as to the plaintiff's right to recover or the amount of rental damages. The defendant seems to have been in possession of the land for at least four years, and there was evidence that it was worth \$100 per year, and this was not disputed by the defendant's proof. Moreover, there was much proof as to the character and value of the land, and the jury could have well looked to these facts as an aid in determining the rental value of the land.

The judgment of the circuit court is affirmed.

Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

[State, ex rel. Knox v. Dillard, et al.]

State, ex rel. Knox v. Dillard, et al.

Quo Warranto.

(Decided April 21, 1916. Rehearing denied May 25, 1916.
72 South. 56.)

1. **Quo Warranto; Burden of Proof.**—Where respondent admits holding and exercising the powers and duties of an office, the burden devolves on him of showing rightful authority for such holding, and the exercise of the powers thereof.

2. **Same; Information; Requisite.**—An information in quo warranto is sufficient if it avers in general terms, designating the particular office, that respondent usurps, intrudes into, and unlawfully holds the same.

3. **Same; Appeal; Statute.**—The statutory system of proceedings in quo warranto as provided by § 5450, et seq., Code 1907, contemplates an appeal by either party from the judgment.

4. **Same.**—Where demurrer is sustained to the petition in quo warranto, and a petitioner declines to plead further, a judgment dismissing the petition, and taxing petitioner with the costs is final.

5. **Statutes; Enactment; Report on Bill.**—As the reference of the bill embraced in Local Laws 1915, p. 98, to a standing committee of the senate, is not affirmatively shown by the journal of the senate, the bill never properly became a law, since it violates the provisions of § 62, Constitution 1901.

6. **Constitutional Law; Necessity of Decision.**—The constitutionality of a law will not be considered on appeal, unless essential to the decision of an actual case.

7. **Appeal and Error; Suggestions of Error.**—The appellate courts will not search for constitutional objections on a general suggestion of unconstitutionality.

8. **Same; Reservation Below.**—Where the determination by the appellate court of questions involving matters of public concern cannot be had without the consideration and decision, of the constitutionality of an enactment, when a specific objection to the constitutionality of the statute is pointed out, and the pertinent parts of the legislative journals are cited, the courts must decide such question, whether raised or argued or not, in the lower court.

(Mayfield and Gardner, JJ., dissent.)

APPEAL from Covington Circuit Court.

Heard before Hon. A. B. FOSTER.

Quo warranto by the State of Alabama on the relation of W. M. Knox and others, against Moses Dillard and others. From a judgment for respondent relators appeal. Reversed and remanded.

[State, ex rel. Knox v. Dillard, et al.]

POWELL, ALBRITTON & ALBRITTON, for appellant. A. WHALEY, and W. L. PARKS, for appellee.

MAYFIELD, J.—Appellant, as relator, filed a statutory complaint or information in the nature of quo warranto against appellees, as authorized by chapter 128, §§ 5450-5472, of the Code, alleging that appellees were usurpers of the offices of members of the court of county commissioners of Covington county, and that the relator, a member of the board of revenue of Covington county, was entitled to discharge the duties of the office alleged to be usurped by one or the other of the appellees. The trial court sustained a demurrer to appellant's amended complaint or information, and the appellant declined to plead further, and suffered judgment of dismissal, and from that judgment prosecutes this appeal.

It is conceded that the correctness or incorrectness of the rulings complained of depends upon the proper construction and the validity or invalidity of certain provisions or sections of a local statute passed by the Legislature of Alabama at the late (1915) session (Local Acts, 1915, pp. 98, 103). This act and the notice of its proposed passage as provided for by section 106 of the Constitution are set out in extenso as exhibits to the complaint or information. The act, as its title indicates, undertook to create a court of county commissioners for Covington county in lieu of a board of revenue for the same county, and to provide for officers to discharge the duties of the court so created, and for the qualifications of such officers, and for their election or selection. As the court created was in lieu of the board of revenue, which was abolished, and as the terms of the members of the board abolished had not expired, the act undertook to provide that the members of the board who should comply with certain provisions of the act should hold office as members of the court created until their successors were elected and qualified under the provisions of the act creating the court. Appellant was a member of the board of revenue, and qualified and held the office under the statute in question until appellees were elected and qualified as provided in the statute, when the latter assumed the duties of the office, and thereafter discharged the duties previously discharged by appellant.

It should be observed that neither appellant nor either of appellees professes to be entitled to hold office for the full term

[State, ex rel. Knox v. Dillard, et al.]

fixed by the statute, but that each professes and claims to be entitled to hold office until the beginning of the first full term fixed in the statute, which is until their successors are elected and qualified at the general election to be held in 1916. In fact, the term to which the claim of office is made is the interim from a special election held 60 days after the passage of the act, to-wit, October 9, 1915, to the general election to be held in 1916, and until their successors are qualified. It is contended by the appellant that the act in question or part thereof is void, which provides that at the general election to be held in 1916 the members of the court or some of them shall be elected, not by the votes of the entire county, but by the votes of the respective districts into which the act in question divides the county. It is therefore apparent that a sufficient answer to this contention is that none of the parties claim any rights under this provision of the act, and that none can claim any such right until an election is held under this provision. If we were to decide this question, the case to this extent would be moot.

It is next insisted that the provision of the act which authorized a special election for the selection of the persons to fill out the unexpired terms until the general election in 1916, at which election the officers should be elected for full terms, was void, because such provision was not authorized by the notice of the intention to pass the bill, as is provided in section 106 of the Constitution. The provisions of the act which relate to the filling of the offices during the interim from the passage of the act until the general election in 1916 are as follows: "Sec. 17. The officers of the board of revenue for said county, who may be in office at the time this act goes into effect shall constitute such respective officers of this said court, if qualified under this act upon filing oath and bond as provided herein within ten days from the approval of this act as a condition precedent, and shall hold office, in such event, until their successors are elected and qualified as provided for in this act.

"Sec. 18. That on the first Saturday after the expiration of sixty days from the approval of this act, an election shall be held in Covington county, to be held and provided for in all respects and carried out as general elections, for the purpose of electing officers for said court, whose terms of office shall begin on the election and qualification under this act, and until their successors are elected and qualified at the general election in 1916; and

[State, ex rel. Knox v. Dillard, et al.]

county officers for said county, shall perform the same duties, and in conformity to the law, as to such special election, its details and the results thereof, as is required under the general laws of this state as to elections."

The record shows that relator was one of the members of the board of revenue, and that he held office under section 17 of the act, from the passage of the act in question until the special election provided for under section 18 of the act, at which time the appellees were elected to fill out the remainder of the interim. Why two modes should thus be provided for selecting the persons to fill out the short interim of a little more than a year is a question of propriety addressed to the Legislature, and not to the court. It is a question of policy, and not of power or right. We are unable to see why such a provision was not authorized to be placed in the bill proposed to be passed, by the notice of intention, published as required by section 106 of the Constitution. The provisions are certainly germane and cognate to the main purpose of the proposed bill; and some such provision or provisions were necessary after the board of revenue was abolished, of course, because the act terminated the right of the incumbents, as members or officers of the abolished board, to hold the offices in question. The court of commissioners created by the act was in lieu of the board of revenue abolished, and all the powers and duties of the board were conferred on the court. The first regular term of office of the members and officers of the court created was not to begin until after the election to be held in the future—more than a year after the board was abolished—and it was not only proper, but necessary, for the Legislature to provide some mode for selecting the persons to fill the offices during the interim; and this they did by sections 17 and 18 of the act, above set out. The mode and manner of selecting these persons was peculiarly within the power and discretion of the Legislature. There is no constitutional prohibition or inhibition as to any particular mode. It could be done equally as well by the act naming certain persons to fill the offices ad interim, or authorizing the Governor or some other authority to appoint such, or providing for an election to select such persons. The Legislature in this case saw fit to adopt two of these methods, instead of one, for selecting the persons to fill out the terms of office during this interim, thus attempting the constitutional method prescribed for filling vacancies in certain judicial offices. Whether the

[State, ex rel. Knox v. Dillard, et al.]

Legislature deemed the two modes necessary, to comply with these constitutional provisions, or whether some other reasons dictated the provisions, it is unnecessary for us to inquire, for the reason that the Legislature was well within the scope of its power in so framing the act.

If the statute were a general one, we apprehend no question would be raised as to the validity of such provisions: for like provisions are well within the powers of the Legislature in creating inferior and statutory courts, in abolishing the same, in filling the offices provided for such courts, in providing for the filling of vacancies to occur, or in providing that other officers shall be ex officio the officers of the courts so created. The authorities to this effect are too numerous to require citation. In fact, the Constitution contains provisions expressly authorizing the exercise of some of these powers, and the others are held not to be prohibited.

It is contended in this case, however, that the statute in question is a local one, and as such is prohibited, except after notice and publication thereof as required by section 106 of the Constitution. This section provides as follows: "No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the Legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

The notice in this case was as follows: "A bill will be introduced in the Legislature of Alabama at its next regular session convening in January, 1915, and enacted into a law for Covington county, Ala., creating and establishing a court of record

[State, ex rel. Knox v. Dillard, et al.]

for said county, styled the court of county commissioners, to be composed of one president, four associate members, and one clerk, to be elected by the qualified voters of said county at the general elections for 1916, and every four years thereafter; and whose terms of office shall be for the time and period as provided by section 1464 of the Code of Alabama, vesting said court, and the officers thereof respectively, with all the powers, duties, jurisdiction, practice, and procedure as is now or may hereafter be conferred upon courts of county commissioners and boards of revenue of this state, and also that of the board of revenue of Covington county, and transferring all the matters, causes, records, and papers of said board of revenue of Covington county into said court of county commissioners, and abolishing said board of revenue for said county, requiring bond of the officers of said court, and prescribing their qualifications and compensations, and to further extend and otherwise enlarge, define, and prescribe the powers, jurisdiction, and duties of said court and the officers thereof, and to constitute the members of the present board of revenue of said county the officers of said court until their successors are elected and qualified as provided for in said bill."

This notice we deem to be ample to authorize any provision in the act in question which is here complained of, and which can here be decided. It is probably the fullest and most specific of its kind which we have examined, and contains provisions possibly not necessary to support the act now under consideration. The provisions of the act are not different from or in conflict with any of the recitals contained in the notice. While the notice did recite that the members of the board of revenue, one of whom was appellant, should hold office with certain qualifications, it did not recite any specific term or time for which they should hold. It recited that they should hold only until their successors were elected and qualified, as provided for in the act proposed to be passed. The act did so provide, as well as how and when their successors should be elected; and they were so elected, and appellant served his full time as so provided, while appellees are now serving the remainder of the interim as is authorized by the act. It therefore appears that appellees are not usurpers, but are by law now authorized and designated as the persons to discharge the duties and exercise the franchises of the office in question, until after the general election to be held in November

[State, ex rel. Knox v. Dillard, et al.]

of the current year, and until their successors are elected and qualified.

Counsel for appellant cite many cases and decisions of this court construing section 106 of the Constitution, and there are many more. All of these we have examined, but none of these cases hold that the provisions of the statute under consideration would be void on account of section 106, or of any other provision of the Constitution; and there has been placed by the court no construction on the Constitution which would have the effect of rendering these provisions of the statute void. It is useless to cite or review all the cases, because each decision is, of course, referable to the particular facts of the particular case; and in all the cases in which the act was declared void the provisions of the statute or the recitals of the notice or the publication thereof was entirely different from the case made on this appeal. What was said in the case of *Christian v. State*, 171 Ala. 52, 54, 54 South. 1001, as to the validity of another local act passed for the same county (Covington), as to the petition of another court of such county, and as to filling vacancies in the offices of such court, is both apt and conclusive in this case. It is there said: "The Constitution does not proceed upon the theory that all the details of every proposed law should be worked out in advance and without the aid of legislative wisdom. It requires only that the local public shall be advised of the substance of the proposed law, of its characteristic and essential provisions, and of its most important features. And this court has so held in a number of cases. Its language has been that the Constitution is complied with if the notice contain a fair compendium or abstract of the act in all its essential features. It has been said that the Constitution does not interfere with the right of the Legislature to shape up and work out the details of local legislation.—*State v. Williams*, 143 Ala. 501, 39 South. 276; *Hanna v. Tunstall*, 145 Ala. 477, 40 South. 135."

In the case of *State, ex rel. Hanna v. Tunstall*, 145 Ala. 477, 40 South. 135, presenting a similar question of conflict between the provisions of a statute and the terms of the notice anticipating it, as to the mode of selecting the officers and filling the places during the interim, it is said: "Under the law as it stood, there was a solicitor of the city court of Anniston, elected by the Legislature, whose term would not expire until February 25, 1905. Notice was given that application would be made to the

[State, ex rel. Knox v. Dillard, et al.]

Legislature to amend that law in the following particulars: (1) So as to provide that this solicitor, at the expiration of the term, should be 'appointed by the governor or elected by the people.' This was a notice to the people that the Legislature was to be asked to decide as to these two methods. No one could be deceived by it, and, if any one had any preference as to whether either one or the other of these methods should be adopted, they should have made known their wishes to their representatives or to the Legislature. The Legislature adopted the elective plan, but, as the time for the regular election had passed, provided for an appointment to fill the office until the next general election of solicitors, which is in exact accordance with the general law."

It follows that appellees are not usurpers of any offices or franchises, but that they have been selected as officers ad interim, as provided by law; and the judgment of the lower court will be affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

ON REHEARING.

MCCLELLAN, J.—(1-3) The rule in proceedings of this character (quo warranto), where the respondent admits that he is holding and exercising the powers and duties of the office, devolves upon him the burden of showing by what authority he holds the office, and that he is in the rightful exercise of its duties and powers. The state has the undoubted right to require of every one who claims to hold and does hold a public office under its statutory or constitutional provisions to show a lawful authority for the exercise of its powers and privileges, and this rule is not changed by statutory provision which permits a private person to join with the state in the inquiry by quo warranto.—*Montgomery v. State, ex rel.*, 107 Ala. 372,, 384, 18 South. 157; *Jackson v. State, ex rel.*, 143 Ala. 145, 147, 42 South. 61; High's Extra. Rem. 629. The information in such a proceeding is sufficient if it avers in general terms, designating the particular office, that the respondent usurps, intrudes into, and unlawfully holds the same.—*Jackson v. State, ex rel., supra.* The statutory system provided in chapter 128 of the Code (section 5450 et seq.) contemplates an appeal from a judgment vindicating the respondent's right to hold the office or declaring him an intruder therein.

[State, ex rel. Knox v. Dillard, et al.]

—Code, §§ 5465, 5469, 5470, 5471. Nevertheless this court has ruled that the statutory system is complete and exclusive, and that the information only (complaint) is a pleading in a civil proceeding, and is demurrable for insufficiency.—*L. & N. R. R. Co. v. State, ex rel. Gray*, 154 Ala. 156, 198, 199, 45 South. 296; Code, § 5461. It is manifest that, whatever may be requisite in other circumstances brought to view by quo warranto, a complaint or information calling into question the rightfulness of one's occupancy of a public office is sufficient if it meets the simple requirements set forth in *Jackson v. State, ex rel., supra*.

(4) The petition filed by this appellant designated the office in which the appellees (respondents) were alleged to be intruders, thereby, if nothing else had been averred, affecting, under the established rule of *Montgomery v. State, ex rel.* and others *supra*, to place the burden upon the respondents to fully set forth the authority by which they severally held the office, unless, for the purposes of the hearing and adjudication of the inquiry, they (respondents) were content to accept the status shown by the petition and to submit the decision of their right to hold the office upon the status disclosed in the petition. The petition asserted that the respondents attributed their right to the office to the provisions of, and an election held under, the act entitled "An act to establish the court of county commissions for Covington county, Alabama," to be found in Local Acts 1915, pp. 98-103, which, the petition alleged, was unconstitutional and void, for the reasons stated in the opinion of Justice MAYFIELD delivered upon the original submission. The respondents separately demurred to the petition. The court sustained the demurrers, and, the petitioner declining to plead further, the court rendered a judgment dismissing the petition and taxing the petitioner with the costs. The judgment thus rendered was final under our complete, exclusive statutory system. See *L. & N. R. R. Co. v. Gray, supra*. It may be that the judgment dismissing the petition and imposing costs, if affirmed in this court, would be res judicata of the respondents' rightful occupancy of the public office in question—a point not necessary to be decided on this appeal, the proceeding being in the name of the state.—*City Council v. Walker*, 154 Ala. 242, 45 South. 586, 128 Am. St. Rep. 54.

(5) The reasons assigned in the petition for the petitioner's averment of the constitutional invalidity of the act to which the

[State, ex rel. Knox v. Dillard, et al.]

respondents attribute their rights to the office were not well founded. In the application for rehearing the appellant for the first time asserts the failure to observe section 62 of the Constitution in the passage of the act in the Senate as a ground for declaring the act invalid. That section (62) positively requires the reference of each bill to a standing committee, and that the journals affirmatively show that fact. The journal of the Senate does not affirmatively show, as the Constitution prescribes, the reference of the act to any standing committee. In these circumstances the act never became a law.—*Walker v. City Council*, 139 Ala. 468, 473, 474, 36 South. 23; *Tyler v. State*, 159 Ala. 126, 48 South. 672; *Dunn v. Dean, Judge, etc., infra*, 71 South. 709, opinion on rehearing.

In *State, ex rel. Sigsbee v. City of Birmingham*, 160 Ala. 196, at page 202, 48 South. 843, at page 845, it was said: "As the only constitutional question presented by the demurrer is whether the act of August 8, 1907, is violative of section 104, par. 29, of the Constitution, and that was the only question considered by the court below and in the argument of the case here, we cannot consider other constitutional questions suggested to us."

(6, 8) Unless essential to the decision of an actual case, the constitutionality of an enactment will not be considered or determined by this court.—*State, ex rel. Crumpton v. Montgomery Excise Com'rs*, 177 Ala. 212, 220, 221, 59 South. 294. This rule is, of course, without force or application where the appeal cannot be determined without taking due account of the constitutional validity of an enactment. It is a further rule, long established in this court at the suggestion of safety and convenience in respect of the performance by this court of the grave duty of deciding the constitutional validity of enactments, that this court will not "search for constitutional objections * * * on a general suggestion of unconstitutionality, *without more*; otherwise this court would, upon every such suggestion, be put to the necessity of searching the original journals of both branches of the Legislature to inquire into the history of the act from its introduction into that body to its final passage and approval. This is a duty that rests upon the complaining party, and not upon the court." (Italics supplied.)—*Fitzpatrick v. State*, 169 Ala. 1, 53 South. 1021; *State, ex rel. v. Montgomery Excise Com'rs, supra*.

[State, ex rel. Knox v. Dillard, et al.]

Where the determination by this court of questions involving matters of public concern cannot be had without the consideration and decision of the constitutional validity of enactments, this court must, in the discharge of its grave duty in that regard, take account of such questions, whether raised or argued in the lower courts or not, and decide them, provided the complaining party manifests his good faith and diligence by affording the essential data to advise the court in the premises and to relieve it of the burden of itself making a search of the journals to ascertain the true status of the subject of his complaint. The quotation before made from the *Sigsbee Case* is not in accord with these conclusions; and so to that extent that opinion must be, and it is, qualified.

The petition under consideration brought into question the constitutional validity of the act of 1915, but the reasons therein assigned for the assertion of its invalidity were not good. A general objection by demurrer that an act is unconstitutional has been accepted here as at least raising the issue of constitutional validity vel non.—*Beauvoir Club v. State*, 148 Ala. 643, 650, 42 South. 1040, 121 Am. St. Rep. 82; *Montgomery v. Birdsong*, 126 Ala. 632, 648, 28 South. 522; *Bay Shell-Road Co. v. O'Donnell*, 87 Ala. 376, 6 South. 119. Since the petition would have been and was sufficient under the rule of pleading stated ante as from *Jackson v. State*, *supra*, and since the general allegation of the unconstitutionality of the act was efficient to invoke and to have justified a ruling, if made, of the court below that the act was invalid, not for a reason alleged, but on a ground or for a reason not particularly specified in the petition, the judgment now rendered cannot be affirmed here when, even for the first time on application for rehearing, the complaining party has fully met the burden of advising the court of the particular well-founded reason or ground for declaring the act invalid. If any other view should be accepted, this court would be placed in the wholly indefensible attitude of affirming a judgment that this court now is brought to know cannot be sustained because the essential basis thereof is an enactment that never became a law. If the trial court had overruled the demurrer, this court could not have pronounced prejudicial error of it.—*Bay Shell-Road Co. v. O'Donnell*, *supra*.

The act under or in consequence of which appellees can alone assert a right to their offices being void, and the fact of invalidity

[State, ex rel. Knox v. Dillard, et al.]

being shown, though much belated, to this court, it follows that the application for rehearing must be granted, and that the judgment be reversed. The cause is remanded that appropriate effect may be given these conclusions by the court below.

Reversed and remanded. All the Justices concur, except MAYFIELD and GARDNER, JJ., who dissent.

MAYFIELD, J.—(dissenting).—I cannot concur. I have examined the subject as thoroughly as I am capable of doing, and the following are my views on the subject. I concede that the majority are much more apt to be correct, but I am nevertheless convinced beyond a reasonable doubt that they are in error, for the following reasons:

The majority have misconstrued the nature and purpose of the proceeding in question. The proceeding in the lower court, and in this court on the original hearing, was not to test the constitutionality of the statute declared void on this application for rehearing, but, on the contrary, was to determine which of two or more persons were entitled to hold office under this very statute until the general election of 1916, at which time the successors were to be elected. It is true that constitutional objections were raised as to certain sections of the act, but not as to the whole act; in fact, the trial court and this court hold one of the sections in question valid, and hold that, if the others were pronounced void, it would not affect the whole statute nor the result of this suit.

It was specifically alleged that the act in question became a law, save as to the sections complained of, and the demurrers of course confessed this allegation: Then how or why should the trial court rule against what was alleged by one party and confessed by the other, and award relief not only not asked but inconsistent with that asked? In order that there may be no dispute as to this, I here set out the allegations to this end. After alleging that plaintiff held another office, that of a member of the board of revenue, until that office was abolished, the information or complaint proceeds to recite that: The plaintiff exercised the powers, discharged the duties, and received the emoluments of said office from the 2d day of January, 1915, continuously "until the enactment into law of an act of the Legislature of Alabama entitled 'An act to establish the court of county commissioners for Covington county, Alabama,' which last-named act,

[State, ex rel. Knox v. Dillard, et al.]

among other things, abolished the said board of revenue and provided that the officers of said board of revenue who may be in office at the time this act goes into effect shall constitute such respective officers of this said court, * * * and therefrom continuously performed and exercised the duties, rights, and powers and received the emoluments of the office of associate county commissioners of the court of county commissioners of Covington county, Alabama, up to and including the 8th day of November, 1915, and was and is entitled, under the Constitution and laws of the state of Alabama, including said last-named act of the Legislature, to hold and possess said office of associate county commissioner of the court of county commissioners of said Covington county, and to perform and exercise the duties, rights, and powers and receive the emoluments of the same, until his successor shall be elected at the general election of 1916, and is qualified, as provided for in said last-named act."

On appeal to this court no question can be raised, even on the original hearing here, which was not raised in the trial court. The trial in this court is not *de novo*. This court has no jurisdiction or right to decide questions on appeal which were not raised in the court below. This is not a rule of propriety or of practice; it is one of jurisdiction and power. On appeal we can only review the questions raised and decided in the court below. I do not understand that the majority deny this last proposition, nor that they now intend to decide to the contrary; but, in my judgment, they do inadvertently decide to the contrary. If I correctly understand the position of the majority, it is that the question now decided was raised in the court below, and therefore necessarily there decided. In my judgment, the error of this position is affirmatively shown by an inspection of the record.

This is not a common-law *quo warranto* proceeding; it is a statutory civil action. This distinction has been repeatedly pointed out by this court. In *quo warranto* proper it is sufficient to allege that the respondent is usurping the office or franchise, whereupon the burden or duty rests on him to show his right to hold, or to exercise; but in this statutory civil suit between two parties all the rules of civil pleading and practice prevail.

In the case of *Ham v. Buck*, 156 Ala. 645, 47 South. 126, this distinction is clearly pointed out by Justice DENSON, and the authorities there collected verify the correctness of the holding. It is there said: "Section 3 of the information or complaint alleges

[State, ex rel. Knox v. Dillard, et al.]

that the respondent usurps, unlawfully holds, and exercises the office of mayor of the town of Elba, which is a public and civil office within the state. In the cases of usurpation and ouster it has been expressly decided that these averments are sufficient against demurrer.—*Jackson v. State, etc.*, 143 Ala. 145, 42 South. 61; *Frost v. State, etc.*, 153 Ala. 654, 45 South. 203. But, when there is sought by this proceeding, 'not only the exclusion of the defendant from the office in controversy, but the installation of the relator, the proceeding is essentially and practically a civil suit, wherein the complaint should set out the facts upon which the relator relies to sustain his title to the office, and so far as practicable, specify the objections intended to be made to the title of the respondent.'—*State v. Price*, 50 Ala. 568; *State, ex rel. Goodgame v. Matthews*, 153 Ala. 646, 45 South. 307. And the statute (Civ. Code, 1896, § 3428) requires that 'the complaint in such action must concisely and clearly set forth the act or omission complained of.'—*State, ex rel. Johnson v. Sou. B. & L. Ass'n*, 132 Ala. 50, 31 South. 375; *L. & N. R. R. Co. v. State, ex rel. Gray*, 154 Ala. 156, 45 South. 296."

Each of the authorities cited supports the holding.

The rule was first announced in the case of *State v. Price*, 50 Ala. 571, where it is said: "The proceeding under our statute commonly called quo warranto, when it seeks, not only the exclusion of the defendant from the office in controversy, but the installation of the plaintiff, is essentially and practically a civil suit, wherein the complaint should set out the facts upon which the plaintiff relies to sustain his title to the office, and, as far as practicable, specify the objections intended to be made to the title of the defendant. The observance of this rule would save defendants much vexation and expense by apprising them at once of what they had to defend."

These statutes have been frequently readopted with this construction placed upon them, and, in my judgment, we ought not now to depart from them.

Under these rules and this interpretation it seems to me that there can be no doubt that the trial court ruled correctly on the demurrer, and that, as the appellant declined to amend or to plead further, no other course was open to the trial than to dismiss the plaintiff's suit.

What the journals of the Legislature show or do not show is a question of fact, and not of law. It is true that courts take

[State, ex rel. Knox v. Dillard, et al.]

judicial notice of what these journals show, but they are not required to examine them, nor to declare what they show, nor to ascertain or decide what they show, until called upon in the proper mode and on the proper occasion. It is very true that this is often spoken of as a question of law, but this is merely to distinguish it from questions which the jury pass upon. In this sense only is it a question of law. For example, whether or not a given bill was referred to a standing committee is of necessity a question of fact, and not of law. But for Constitutions, that question would have to be found by a jury, because a disputed question of fact. Our Constitution, however, requires the fact of reference to appear on the journals, and therefore limits the proof of the fact to this written document; and the construction of any written document is a question for the court, and not for the jury.

Appellate courts, when exercising purely appellate jurisdiction, as in this cause, have no jurisdiction or power to consider evidence not before the trial court, or to decide questions of law not raised, and therefore not passed upon, in the court below, not even a constitutional question involving the validity of a statute. The following is what this court has heretofore said on this subject.

In *Sigsbee's Case*, 160 Ala. 196, 48 South. 843, this exact question was presented and considered and decided; and, in my judgment, the decision and opinion then rendered are correct. As the opinion in that case is short, but in point and conclusive, I here set it out:

"ON REHEARING.

"PER CURIAM.—As the only constitutional question presented by the demurrer is whether the act of August 8, 1907, is violative of section 104, par. 29, of the Constitution, and that was the only question considered by the court below and in the argument of the case here, we cannot consider other constitutional questions suggested to us."

When the statute in question became operative, and appellant assumed office under it, the Legislature was in session, and could then amend the journals if they did not show a reference of the bill. Certainly until the Legislature adjourned it was impossible in law or in fact to know what the journals would ultimately

[State, ex rel. Knox v. Dillard, et al.]

show. It seems to me that any other rule would be almost intolerable to the trial courts. Until the journal is printed and bound there is only one copy of that of each house, and it is not usually printed and bound until months after the Legislature has adjourned. For example, no part of the journals were printed when this case was tried, and the whole is not yet printed at this late date. I ask how in law or in fact the trial judge could have known what the journal showed, with reference to the bill in question, without access thereto, or having a certified copy thereof before him. Yet we are here deciding that he should know, or did know, that which no one knew or could know without an inspection of the journal itself, and it had not then been printed, if it had been made up. The following is what other courts have said on the subject:

The Supreme Court of Illinois seems to have dealt oftener, if not first, with the question of the legislative journals' failing to show a compliance with constitutional provisions similar to those of our Constitution; and in the case of *Grob v. Cushman*, 45 Ill. 124, that court said: "It is first insisted that the La Salle county court did not have jurisdiction of the subject-matter of this cause; that the act of the Legislature under which jurisdiction was claimed never became a law in the mode prescribed by the Constitution. And counsel in their argument refer to the journals of the House in support of the position. On the trial below no evidence from the journals was introduced. But it is now urged that, as they are public records, this court will take judicial notice of them, and not require them to be embodied in the evidence. It is true that they are public records, but it does not follow that they will be regarded as within the knowledge of the courts like public laws. Like other records and public documents, they should be brought before the courts as evidence. But when offered they prove their own authenticity. Until so produced they cannot be regarded by the courts."

In the case of *Devine v. Fish Furniture Co.*, 258 Ill. 389, 391, 101 N. E. 539, it is said: "Whether a statute has been passed by the General Assembly in compliance with the constitutional provisions relating to the manner in which a statute must be passed is a question of fact, which must be proven before the cause is submitted to the jury. This question cannot be raised for the first time on a motion to set aside the verdict and for a new trial. On such a motion the only errors which can be considered are

[State, ex rel. Knox v. Dillard, et al.]

such as have intervened on the trial. It is manifest that the court could not err in reference to a matter which was not presented on the trial.

"Counsel for the appellant contend that, inasmuch as the whole Senate Journal was admitted in evidence, this and every other matter it contained were presented, and appellant had the right, on the hearing of the motion for a new trial, to urge anything appearing therein of which it desired to take advantage. The better practice would have been for the court to have permitted the introduction of only such portions of the Senate Journal as had a bearing upon the particular fact then sought to be proven. But in this case the result is the same, as the court expressly limited the application of this evidence to the question of the constitutionality of the amendment to the Fire Escape Act."

In a more recent decision of the last-mentioned court there was presented the same question here under review, and the court again said:

"In the exercise of appellate jurisdiction the court cannot receive evidence of facts not before the court whose judgment is being reviewed, and can only receive evidence while exercising original jurisdiction. The validity of the act could only be questioned in this court on the ground alleged, in some proceeding in which the court has jurisdiction to try issues of fact, and the contents of the journals of the General Assembly must be proved like any other fact.—*Spangler v. Jacoby*, 14 Ill. 297 [58 Am. Dec. 571]; *Devine v. Fish Furn. Co.*, 258 Ill. 389 [101 N. E. 539]."
—*Frietag v. Union Stockyards Co.*, 262 Ill. 551, 104 N. E. 901, 902.

The Supreme Court of New York has spoken as follows on the subject in the case of *People v. Supervisors, etc.*, 8 N. Y. (4 Selden), 323, 324:

"The plaintiffs in error insist that the act of April 16, 1851, entitled an act for the enrollment of the militia, etc., is unconstitutional both in the mode in which it was passed and in its subject-matter, apparent on the face of the act. If either of these grounds be established, the judgment of the court below should be reversed.

"The objection on the score of form is divided into three heads: (1) The question on the final passage of the act was not taken by ayes and noes; (2) the ayes and noes were not duly

[State, ex rel. Knox v. Dillard, et al.]

entered upon the journal; and (3) three-fifths of all the members elected to the Legislature were not present at its final passage.

"The first answer to these objections is that the plaintiffs in error are not in a condition to raise either of them. Where the objection to the validity of a law springs out of the failure of the Legislature to comply with the provisions of the Constitution, which is not apparent upon the act itself, it should be distinctly set forth in the pleadings, or in this case in the return. The adverse party should have an opportunity to controvert the allegation, and to prove a due conformity on the part of the Legislature with the requirement of the Constitution. The legal presumption is that a law published under the authority of the government was correctly passed, so far at least as relates to matters of form.—*Thomas v. Dakin*, 22 Wend. [N. Y.] 9; *Hunt v. Van Alstyne*, 25 Wend. [N. Y.] 608."

The error into which the majority of my Brothers have fallen is well pointed out above, better than I could hope to do. While journals may be considered public records of which judges and courts will take judicial notice, the contents thereof cannot and will not be "regarded as within the knowledge of the courts like public laws."—45 Ill. 124.

This holding of the Illinois and New York courts has been often approved by the highest tribunal in the United States, if not the highest in the world. In the cause of *In re Duncan*, reported in 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219, that court, speaking through its Chief Justice, said: "It has been often held by state courts that evidence of the contents of legislative journals which has not been produced and made part of the case in the court below will not be considered on appeal.—*Ill. Cent. Railroad Co. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119; *Hensoldt v. Petersburg*, 63 Ill. 157; *Auditor v. Haycraft*, 14 Bush. (Ky.) 284; *Bradley v. West*, 60 Mo. 33; *Coleman v. Dobbins*, 8 Ind. 156.

"The distinction is recognized between matters of which the court will take judicial cognizance 'immediately, suo motu,' and those which it will not notice 'until its attention has been formally called to them.'—Gresl. Eq. Ev. 292, 306. As to the last Mr. Gresley says: 'It will not point out their applicability nor call for them, but if they are once put in by either party it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own

[State, ex rel. Knox v. Dillard, et al.]

evidence independently of the parties.'—*Jones v. United States*, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691.

"As a statute duly certified is presumed to have been duly passed until the contrary appears (a presumption arising in favor of the law as printed by authority, and in a higher degree of the original on file in the proper repository), it would seem to follow that wherever a suit comes to issue, whether in the court below or the higher tribunal, an objection resting upon the failure of the Legislature to comply with the provisions of the Constitution, should be so presented that the adverse party may have opportunity to controvert the allegations and to prove by the record due conformity with the constitutional requirements.—*People v. Supervisors of Chenango*, 8 N. Y. (4 Seldon) 317, 325."

The following cases are to the same effect: *Smith v. Speed*, 50 Ala. 276; *Joiner v. Winston*, 68 Ala. 129; *Hill v. Tarver*, 130 Ala. 592, 30 South. 499; *Bray v. State*, 140 Ala. 172, 37 South. 250; *Foster v. Lee*, 172 Ala. 32, 55 South. 125, Ann. Cas. 1913C, 1335; *Shook's Case*, 177 Ala. 522, 58 South. 390; *K. C., M. & B. R. R. Co. v. Whitehead*, 109 Ala. 495, 19 South. 705; *Shehane v. Bailey*, 110 Ala. 308, 20 South. 359; *Ex parte Steverson*, 177 Ala. 384, 58 South. 992; *Southern Ry. v. Stonewall*, 177 Ala. 327, 58 South. 313, Ann. Cas. 1915A, 987; *Wes. Ry. v. Foshee*, 183 Ala. 182, 62 South. 500; *Lovejoy v. Montgomery*, 180 Ala. 473, 61 South. 597. There are scores of others, some of which are cited in the above cases. In the case last cited it was said: "'He who assails a statute on the ground that it is unconstitutional assumes the burden of vindicating his position beyond a reasonable doubt.'—*State, ex rel. Meyer v. Greene*, 154 Ala. 254, 46 South. 268; *State, ex rel. City of Mobile v. Board of Revenue and Road Commissioners of Mobile County*, 180 Ala. 489, 61 South. 368. Presumptively, therefore, all statutes are constitutional, and the burden is on him who assails a statute as violative of a particular clause of the Constitution to show that it does, in fact, contravene the particular provision of the fundamental law."

In *Southern Ry. Co. v. Stonewall*, *supra*, the plea of the general issue was held not to put in issue the constitutionality of a statute on which the rights of the parties depended.

In *Fitzpatrick's Case*, 169 Ala. 1, 5 South. 1021, it is said: "Where the act is not patently invalid on its face, it has been the rule of this court not to search for constitutional objections to an enactment of the Legislature on a general suggestion of uncon-

[State, ex rel. Knox v. Dillard, et al.]

stitutionality without more; otherwise this court would, upon every such suggestion, be put to the necessity of searching the original journals of both branches of the Legislature to inquire into the history of the act from its introduction into that body to its final passage and approval. This is a duty that rests upon the complaining party and not upon the court. Unless the act is patently unconstitutional on its face, the presumption should be in favor of its validity."

In *Crumpton's Case*, 177 Ala. 212, 59 South. 294, it is said: "It is the established rule of this court to decline to pass upon the constitutional validity of legislative enactments, unless the determination of the questions and rights then before it requires their decision.—*Smith v. Speed*, 50 Ala. 276; *Bray v. State*, 140 Ala. 172, 179, 37 South. 250; *Hill v. Tarver*, 130 Ala. 592, 30 South. 499. It is of course a corollary of this rule, arising from the reason of the rule itself, that, where several or many constitutional questions are presented by the record, that or those only will be considered or determined which is or are necessary to the adjudication of the controversy. In short, this court will not decide any constitutional question respecting the validity of legislation, unless its decision thereupon is 'indispensable' to the determination of that litigation."

In *Wes. Ry. of Ala. v. Foshee*, *supra*, the constitutionality of a statute was assailed and its invalidity insisted upon. Upon this statute solely depended the rights of the parties on the appeal; and in that case it was said: "We have thought it best not to enter upon a discussion of the only objection which, it occurs to us, may with plausibility be taken against the act, to-wit: That it destroys the right of the parties to a suit to contract and dispose of a disputed claim according to their own concurring notions of right and justice, for the reason that we are satisfied the question cannot be raised by demurrer to pleas as plaintiff undertook to raise it in this case."

In the case of *Brown v. A. G. S. R. R. Co.*, 87 Ala. 370, 6 South. 295, the constitutionality of a statute was challenged in the justice court, and was upheld. On appeal to the circuit court it was again challenged on the same ground, and the circuit court declared the act void. On appeal to this court the decision of the circuit court was affirmed. Some years thereafter, in the case of *K. C., M. & B. R. R. Co. v. Whitehead*, 109 Ala. 495, 19 South. 705, this court, speaking through BRICKELL, C. J., said

[State, ex rel. Knox v. Dillard, et al.]

this of that decision: "Statutes cannot be pronounced unconstitutional at the mere will of courts, or in suits in which they are not involved, not the foundation of any right asserted by the plaintiff, or matter of defense preferred by the defendant.

* * *

"It is not of consequence now within our province to consider whether it is violative of or in strict conformity with the Constitution. That question must remain open until a case may arise in which its decision becomes necessary to the adjudication of the rights of the parties. If it should arise, the court cannot be trammelled by the opinion in *Brown v. Alabama Great Southern R. Co.*, 187 Ala. 370 [6 South. 295]."

There is another reason why I cannot concur. The validity of the statute in question, as a whole, was not assailed. The complaint alleged in terms that the enactment was duly passed by the Legislature. The defect relied on went only to a part of the statute, and not to the whole. The complaint shows that plaintiffs treated it as in part valid, that they held office under it, and they here seek to continue to hold office under it; so assuredly they are not the proper persons to raise the question here decided. It has been repeatedly decided by this court that parties who rely on a statute, and act under it, and receive benefits under it, will not be heard to assail it. In *Baldwin v. Kouns*, 81 Ala. 272, 2 South. 638, it was said: "Neither party is in a position to assail the constitutionality of the statute, both claiming and asserting rights under it as a valid enactment. We have therefore not considered the constitutionality of any of its provisions and do not wish to be understood as intimating any opinion. We have assumed its validity as between the parties to this proceeding solely for the purposes of this decision."

GARDNER, J.—(dissenting).—The majority opinion in this case strikes down the act in question (referred to as House Bill No. 4) for the reason, as they conceive it, that the journal of the Senate fails to affirmatively show an exact compliance with the provisions of section 62 of our Constitution. I consider the question one of the gravest importance—one fraught with great dangers to the stability of our laws. The rule established by an unbroken line of authorities in this state—and, indeed, there has been no diversity in the courts as to the same—is that a statute is presumptively valid and constitutional, and that the burden is

[State, ex rel. Knox v. Dillard, et al.]

on him who assails the statute as violative of any particular clause of the Constitution to show that it does in fact contravene the particular provision of the fundamental law.

In the recent case of *Lovejoy v. City of Montgomery*, 180 Ala. 473, 61 South. 597, this court said: "It is a solemn thing * * * to strike down a statute. A statute is, at least presumably, an expression by the people of their will through their representatives selected by them for the purpose of making their laws. * * * 'He who assails a statute on the ground that it is unconstitutional assumes the burden of vindicating his position beyond a reasonable doubt.' * * * Presumptively, therefore, all statutes are constitutional, and the burden is on him who assails a statute as violative of a particular clause of the Constitution to show that it does, in fact, contravene the particular provision of the fundamental law."

Clearly, therefore, the burden is upon those who assail the statute here involved to convince this court beyond a reasonable doubt that section 62 of the Constitution has been violated. That section reads as follows:

"No bill shall become a law until it shall have been referred to a standing committee of each house, acted upon by such committee, in session, and returned therefrom, which facts shall affirmatively appear upon the journal of each house."

The journal of the Senate, in reference to the particular bill in question, discloses the following action thereon:

Senate Journal, pages 809, 813 to 815, inclusive, and 824. Fifteenth Day.

MESSAGE FROM THE HOUSE.

Mr. President:

The House has originated and passed the following bills:
* * *

H. 4 Also—

To establish the court of county commissioners for Covington county, Alabama, and sends same herewith to the Senate without engrossment and with notice and proof attached. * * *

W. F. Herbert, Clerk.

HOUSE MESSAGE.

The House Bills in the foregoing message were severally read once and referred to appropriate standing committees as follows:

[State, ex rel. Knox v. Dillard, et al.]

H. B. 349 to committee on local legislation.

H. B. 287 to committee on revision of laws.

H. B. 474 to committee on judiciary.

Senate Journal, pages 919 and 920. Sixteenth Day.

Mr. Milner, chairman of the standing committee on revision of laws, reported that said committee, in session, had acted on the following bills and ordered same returned to the Senate with a favorable report, and they were severally read a second time and placed on the calendar, to-wit: * * *

By Mr. Hardage.

H. 4. To establish the court of county commissioners for Covington county, Alabama. * * **

This journal therefore shows that House Bill No. 4 was included in the message from the House, and it affirmatively states that all the bills in the said "foregoing message" were severally read once and referred to appropriate standing committees. In naming the committees and the bills House Bill No. 4 seems to have been omitted. The journal next affirmatively shows that a standing committee—the committee on revision of laws—favorably reported on said House Bill No. 4.

The sole question therefore is whether or not a mere clerical error omitting House Bill No. 4 in the designation of the committee shall work the destruction of a law and cause it to be declared violative of section 62 of the Constitution. That the language used affirmatively shows a reference of the bill to a standing committee and a report thereon by a designated standing committee is without question. It is argued, however, that as the journal fails to disclose the particular committee to which the bill was referred, we are not permitted to assume or to infer that the committee reporting the bill was the committee to which it had been referred. This argument, in my opinion, is fallacious, for the simple reason that it indulges a presumption against the law, and a presumption against a due performance of duty by sworn officers, when by an unbroken rule of all the authorities the presumption is directly to the contrary, and is in favor of the regularity of the passage of the law and the due performance of their duties by the lawmakers and sworn officers of the state. In my opinion, the reasonable inference to be drawn from the language used is that the committee reporting the bill was the committee to which it had been referred. I find nothing in section 62 of the Constitution which prohibits the court from hold-

[State, ex rel. Knox v. Dillard, et al.]

ing that that section has been complied with by a construction of the journal based upon a reasonable and logical inference from the language there used. To do this we do not have to presume a fact, but simply, upon the facts stated in the journal, as reasonable beings, to draw a reasonable inference therefrom. The language above quoted from the journal would clearly lead to the natural inference that the committee reporting the bill was the committee to which it had been referred. Does any one on this account have a reasonable doubt that such in fact was the case? Indeed, does it not appear—reasonably appear—that the omission to designate House Bill No. 4 in naming the committees was but a clerical error?

We have no case holding to the contrary. None of our decisions hold to so strict and literal an interpretation of this section of the Constitution as do the majority in this case. The case of *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879, is, to my mind, directly in point, and sustains the conclusion I have reached here. See, also, *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

If it appears by reasonable and natural inference that this section has been complied with, I am unable to see what harm could result; but, on the other hand, it appears to my mind that the provision of section 62, under the construction here given, would be fraught with much more mischief than was ever the evil attempted to be remedied by it. It is a well-recognized rule that Constitutions are to be given liberal construction, and should not be technically construed. A Constitution should be interpreted to carry out the great principles of government, and not to defeat them. As said by Mr. Black in his work on Constitutional Law (2d Ed.) p. 67:

"A Constitution is not to be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects of its establishment and carry out the great principles of government. * * * Constitutions * * * 'declare the organic law of a state. They deal with larger topics and are couched in broader phrase than legislative acts or private muniments. They do not undertake to define with minute precision in the manner of the latter, and hence their just interpretation is not always to be reached by the application of similar methods.' 'A Constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words.'"

[State, ex rel. Knox v. Dillard, et al.]

The construction placed upon this section of the Constitution by the majority is, in my opinion, violative of this well-recognized rule. I am further of the opinion that the conclusion reached in this case is diametrically opposed to the conclusion reached in the case of *Walker v. City of Montgomery*, 139 Ala. 468, 36 South. 23, cited by all subsequent cases upon this provision of the Constitution, and recognized as the leading authority in this state on the question.

The citation of the case in the majority opinion discloses that it is still considered the leading authority; and yet in that very case the court was bound to hold that the provisions of section 62 of the Constitution had been complied with, from a natural and reasonable inference drawn from the language of the journal. That case presents the exact converse, as I view it, of what we have here. No one questions the proposition that under the language of section 61 it is of equal importance that the journal affirmatively disclose that the committee to which the bill was referred had acted upon it in session. In short, it must be conceded that it is just as necessary for the journal to affirmatively show an action by the committee to which the bill was referred as it is to show to what committee it was referred.

The *Walker Case*, *supra*, discloses that the journal affirmatively showed that the bill was referred to the committee on local legislation. On page 479 of the opinion, speaking of the language of the journal respecting the return of the bill to the House by that committee, is the following:

"The journal, it is conceded, does affirmatively show that this bill was referred to the committee on local legislation, a standing committee of the house. In respect of action in committee on the bill and of its return to the House the journal contains the following entries:

" 'BILLS ON SECOND READING.

" 'The chairman of the several standing committees reported that the committees, in session, had acted favorably upon the following bills:

" 'H. 467. To provide for the apportionment and collection of unpaid taxes in any new county formed under the Constitution and laws of this state.

" 'H. 29. To amend subdivision 7 of section 1144 of the Code of Alabama.

[State, ex rel. Knox v. Dillard, et al.]

"H. 435. To authorize street railway companies in this state to increase their capital stock.

* * * * *

"S. 109. To alter and rearrange the boundaries of the city of Montgomery, extending the corporate limits of said city. (Note. February 12. S. 109 reported without recommendation and placed upon the calendar.)

"H. 193. To amend section 3504 of the Code of 1896.

* * * * *

"The above and foregoing bills, having been returned to the House, were read a second time and placed on the calendar.' (We have substituted asterisks in the places of many other Senate and House Bills.)

"Upon considerations already adverted to, we are of opinion that these entries upon the journal affirmatively show that Senate Bill 109 was returned from the committee into the House, and that the action had by the committee was had in a session of the committee."

I have referred to the House Journal of 1903, and find that the above quotation taken therefrom and set out in the opinion as quoted above truly represents all that the journal discloses in reference thereto, with the exception, as noted, of a number of other bills included in the general list. Let it therefore be noted that the journal of the House in that case did not affirmatively disclose that the bill had been acted on by the committee on local legislation, to which it was referred. The only reference in regard thereto is the following: "The chairmen of the several standing committees reported that the committees in session had acted favorably upon the following bills."

It does not state, and it is nowhere disclosed except by natural inference, of course, that the committee on local legislation favorably reported Senate Bill 109, there under consideration.

The argument made in the case here under review is equally applicable to the record as shown in the opinion in the *Walker Case*. Who can say that the journal of the House in that case affirmatively shows that the committee on local legislation favorably reported that bill, or whether it might have been included in the report of another committee? But the court drew from the language used the natural inference that the committee to which the bill had been referred was the committee which had favorably reported it. That is the exact converse of the situation we

[State, ex rel. Knox v. Dillard, et al.]

have here. The Senate Journal here does show a reference of the bill to a standing committee and a report thereon by a standing committee—the committee on revision of laws. Why, then, should we not draw the reasonable and natural inference that the committee reporting the bill was the committee to which it had been referred, just as the court in the *Walker Case* drew the natural inference that the committee to which the bill had been referred was the committee which made the favorable report thereon? This question was fairly before the court in the *Walker Case*. It seems to have been there treated as a matter of course by the able counsel for the respective sides. It cannot be said to have been overlooked by the writer of the opinion. He refers to the “general statement” on the journal, in which this bill must be held to be included, saying:

“So that part of the *general statement* [italics supplied] would stand as applying as well to S. 109 as to the other bills embraced in the entry.”

Not only that, but the very language of the journal is set out in full in the opinion in that case. The opinion concludes:

“We concur with the city court in holding the act * * * was enacted in consonance with the requirements of section 62 of the Constitution.”

The writer of the opinion in that case is regarded by the legal profession as having been one of the ablest jurists ever on the bench of this state.

In my opinion, therefore, the conclusion reached by the majority in this case is in the very teeth of the conclusion of the court in the *Walker Case*, *supra*. Both decisions cannot consistently stand as the law of this state. The conclusion reached in the *Walker Case* is consistent not only with the rule in regard to the liberal construction of our Constitution, but with sound reason and common sense, and I can see no good cause for departing therefrom.

I forego a further expression of my views, but the question is one of such great importance that I felt it not inappropriate to thus briefly state them. I therefore cannot concur in the conclusion reached by the majority, and respectfully dissent.

MAYFIELD, J., concurs in the foregoing opinion.

[Langley, et al. v. Langley.]

Langley, et al. v. Langley.**Partition.**

(Decided May 11, 1916. 72 South. 91.)

Partition; Title; Adverse Claim.—Under § 5220, Code 1907, the probate court is without jurisdiction to proceed with the partition for sale for distribution among tenants in common, where an adverse claim is asserted, unless upon investigation it determines that the claim is not grounded in good faith.

APPEAL from Chambers Probate Court.

Heard before Hon. J. J. ROBINSON, JR.

Petition by Mary Langley for partition for sale of land among tenants in common, making A. J. Langley and another respondents. From the action of the court striking defendant's pleas, they appeal. Reversed and remanded.

R. J. HOOTEN, for appellant. G. B. WALKER, and STROTHER, HINES & FULLER, for appellee.

MCCLELLAN, J.—This petition was filed in the probate court by Mary Langley to have a sale of land for distribution of the proceeds among tenants in common. The appellants, A. J. Langley and B. E. Thompson, were named in the petition as joint owners, with the petitioner and others, of the land. Langley and Thompson (appellants) filed a paper, in the nature of a plea to the petition, wherein it was averred that they were in the adverse possession of the lands described in the petition, claiming them under a warranty deed, from Susan Littlefield, of date July 6, 1911. The petitioner moved the court to strike this plea, assigning two grounds, viz.: That the plea presented no answer to the petition; that, the petition being for a sale for distribution, an adverse claim of the lands presented no answer to the petition. The court granted the motion and struck the plea; no inquiry into the good faith of the claim of adverse holding being made by the court.

Code, § 5220, reads: "No division or partition or sale for distribution can be made under this article, in the probate court when an adverse claim or title is asserted by any one, or brought

[Danforth v. McClellan.]

to the knowledge of the commissioners, or of the judge of probate."

As appears, the statute now has application to cases where sales for distribution among tenants in common are sought in the probate court. The court below evidently overlooked the change in the statute. The court should have made investigation of the good faith of the claim asserted by the appellants, and determined the question before proceeding to consider the propriety of ordering the sale as prayed. If, on such investigation, the court found that the claim was grounded in good faith, then the probate court was without jurisdiction to proceed to order the sale for distribution.—*Layton v. Campbell*, 155 Ala. 220, 46 South. 775, 130 Am. St. Rep. 17. The court erred in striking the plea of the appellants without an investigation of and a decision upon the issue of the claimants' good faith thereby raised.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Danforth v. McClellan.

Motion to Tax Costs.

(Decided May 18, 1916. 72 South. 104.)

1. **Costs; Judgment for Residue; Statute.**—Under § 3663, Code 1907, where plaintiff recovered \$10 damages and \$10 costs in a tort action, and there was no certificate that plaintiff should have recovered more damages, the action of the court in refusing to enter judgment against plaintiff for the residue of costs was erroneous.

2. **Same.**—In the absence of such a certificate from the record that plaintiff should have recovered more damages the appellate courts cannot presume that such certificate was made.

3. **Same; Witness's Fees; Liability.**—Judgment in favor of a party for costs does not relieve him from liability to the officers or the witnesses for their fees, although a judgment has gone against the other party for cost, which includes such fees.

4. **Same; Statutory Provision; Instruction.**—As used in the statute the word "residue" includes all costs plaintiff could have recovered whether expended by plaintiff or defendant, less \$10 in this case, since a judgment for full costs includes all the fees earned by the officers and witnesses in the case, regardless of the party for which the services were rendered, as judgment for costs can only be rendered for parties to the suit.

(Somerville, J., dissenting.)

[Danforth v. McClellan.]

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Andrew N. McClellan had judgment in tort against A. P. Danforth, for \$10 damages and \$10 costs, and defendant entered a motion for judgment against plaintiff for the residue of the cost, which judgment was denied and defendant appeals. Reversed and rendered.

Transferred from the Court of Appeals.

L. J. COX, for appellant. HARSH, HARSH & HARSH, and CHARLES C. McNABB, for appellee.

MAYFIELD, J.—(1) Judgment was rendered in the court below, in a tort action, for plaintiff, to the amount of \$10 damages and \$10 costs. Defendant moved the court for a judgment against plaintiff for the residue of the costs. The court declined to enter such judgment for the defendant, and defendant appeals.

This action of the court was error to reverse. It was a failure and declination to do what the statute expressly declares must be done in such cases. Section 3663 of the Code applies and controls. It reads as follows: "In all actions to recover damages for torts, the plaintiff recovers no more costs than damages, where such damages do not exceed twenty dollars, unless the presiding judge certifies that greater damages should have been awarded; and on failure to certify, judgment must be rendered against the plaintiff for such residue."

(2) There is no certificate that plaintiff should have recovered more damages, and in the absence thereof, we cannot presume that such a certificate was made.—*Rarden v. Maddox*, 141 Ala. 507, 39 South. 95, and cases cited. This case is somewhat different from others in which a judgment was wrongfully rendered against the defendant for full costs. The defendant, in such cases, however, is not only entitled to be relieved of a judgment against him for full costs, but also to have a judgment against the plaintiff for the "residue," for so says the statute. The trial court probably declined to give him the judgment, acting on the theory that the "residue" included only costs which the plaintiff had expended, and not costs which the defendant had expended, and therefore that he had no interest or concern in plaintiff's costs.

(3, 4) There is a distinction, of course, between costs and fees, as has been pointed out often by this court; but this distinc-

[Danforth v. McClellan.]

tion has no application here. Under our practice a judgment for full costs includes all the fees earned by the officers and the witnesses in that case, no matter for which party the services were rendered, and no matter against which party the judgment for costs be rendered. The judgment for costs can only be rendered in favor of parties to the suit; it cannot be rendered in favor of the officers or the witnesses, though the proceeds may ultimately go to the latter.—*Patterson v. Officers of Court*, 11 Ala. 740. The judgment in favor of a party for costs does not relieve him from liability to the officers or the witnesses for their fees, though a judgment has gone against the other party for costs which included such fees.

In the case of *South & North Ala. R. R. Co. v. Bradley*, 84 Ala. 469, 4 South. 611, the latter, as clerk of the court, sued the former for fees in certain cases in which the railroad company was successful; and the court said: "The fees due the plaintiff, as compensation for official services performed by him, at the request of the defendant, being such as were authorized by law, constituted a debt, for which an action of debt, or indebitatus assumpsit would clearly lie. And the provisions of the statute, authorizing a judgment to be rendered in favor of the successful party for costs in civil actions (Code 1886, § 2837), is no bar to the maintenance of such a suit.—*Hill v. White*, 1 Ala. 576; *Carr-vill v. Reynolds*, 9 Ala. 969; *Tillman v. Wood*, 58 Ala. 578; *Dane v. Loomis*, 51 Ala. 487; *Bradley v. State*, 69 Ala. 318."

The defendant is therefore liable for fees and costs, notwithstanding the judgment against him in this case is limited to \$10. If the plaintiff had recovered full costs of him this would have included all the fees due the officers and the witnesses in the case, consequently, the "residue," as mentioned in the statute, includes all the costs the plaintiff could have recovered, less \$10. So it clearly appears that the error was not without injury to the defendant.

The judgment appealed from will therefore be reversed; and in accordance with the practice of this court in such cases, a judgment will be here rendered for the residue, as directed by the statute.—*Rarden v. Maddox*, *supra*; *Tecumseh v. Mangum*, 67 Ala. 246, 247; *Guttery v. Boshell*, 132 Ala. 596, 32 South. 304.

Reversed and rendered. All the Justices concur, except SOMERVILLE, J., who dissents.

[State v. Western Union Telegraph Co.]

SOMERVILLE, J.—I find no warrant in the statute for rendering a judgment in favor of the defendant for the defendant's costs. It seems to me that a proper construction of sections 3662, 3663, of the Code would be that a plaintiff in tort who recovers less than \$20 is penalized only by the loss of his own costs in excess of the amount of the judgment. But as the question has been settled by the majority of the court, I refrain from a useless statement of the reasons for my own conclusion.

State v. Western Union Telegraph Co.

Taxation Proceedings.

(Decided April 20, 1916. Rehearing denied June 1, 1916.
72 South. 99.)

1. **Taxation; Statutes; Construction; Telegraph Company.**—Construing §§ 2143, 2144 and 2145, Code 1907, it is held that a telegraph company must return to the auditor all properties of all kinds, including its office fixtures, etc.; the doctrine of ejusdem generis not limiting the property returnable to the poles, batteries, etc., as used in the business.

2. **Statutes; Construction; Ejusdem Generis.**—The maxim "Ejusdem Generis" by which general words following the enumeration of a particular class of persons or things will be construed as applicable only to persons or things of the same general nature or class as those enumerated, is only an illustration of the broader maxim, "Noscitur a Sociis," and, where applicable, does not require that the general terms be entirely rejected, and where it can be ascertained that the particular word by which the general word is followed was inserted for a distinct object, and not to give color to the general word, it becomes a rule of intention.

3. **Same; Noscitur a Sociis.**—The maxim "Noscitur a Sociis" means that general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to that of the less general.

4. **Same; Giving Effect to Every Part.**—If possible, every part of a statute should be upheld and given appropriate force.

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Proceeding by the State of Alabama against the Western Union Telegraph Company. Judgment for respondent, and the State appeals. Affirmed. Transferred from the Court of Appeals under Acts April 18, 1911 (Acts 1911, p. 450) § 6.

[State v. Western Union Telegraph Co.]

The back tax commissioner of Calhoun county sought to assess for the tax year beginning October 1, 1913, as escapes, certain property of the company located at its office in Anniston, Calhoun county, consisting of an iron safe, stove, and other office fixtures, in the sum of \$500. The company interposed certain pleas, which appear from the opinion.

WILLIAM L. MARTIN, Attorney General, and LAWRENCE E. BROWN, Assistant Attorney General, for the State. RUSHTON, WILLIAMS & CRENSHAW, for appellee.

THOMAS, J.—The question presented for decision is the authority of the state to require the Western Union Telegraph Company to assess in Calhoun county the property in question, consisting of certain office fixtures.

(1) Defendant's pleas aver that the property on which the assessment was made was, on October 1st, and at all times during the tax year, connected with the business of the defendant as a commercial telegraph company operating in the several counties of the state of Alabama, and in the county of Calhoun where the local assessment was sought to be made; that during the tax year for which said assessment was made on said properties, section 2143 of the Code of 1907 required that return by the defendant be made to the state auditor for assessment by the state board of assessment of Alabama, and that return was duly made by defendant as required by this statute; and that the tax commissioner of the county was without jurisdiction to make said assessment. The demurrer raised the question that neither plea presented a valid reason for vacating or annulling the assessment made by the tax assessor or the tax commissioner of Calhoun county.

The statute provided that every telegraph or long-distance telephone company, whose lines or any part thereof is located within the state, must make annually "a return of the number of miles of telegraph or telephone wire in the state belonging to such company, and the number of poles, batteries, instruments, and articles of all kinds, in the state, connected with its business, specifying the several counties in which such property is situated and the items of property situated in each of such counties, and if any such company, its officers, or agents, fail to make such return within the time specified, the state auditor must ascertain

[State v. Western Union Telegraph Co.]

such items of property and values from the best information he can obtain."—Code 1907, § 2143.

Section 2144 requires the state auditor to lay before the state board of assessment such returns, or to report to the board the items of property and values of the company, failing to make returns, as ascertained by him; and thereupon the state board of assessment must examine such returns and reports, determine the valuation of such property, and assess the same for taxation, as prescribed by statute, and may add to the assessment against any telegraph or long distance telephone company failing to make return within the required time a penalty not exceeding 50 per cent. thereon; and the state auditor must thereupon give to the tax assessors of the several counties in which such property is situated, and to the superintendent or managing agent of such company in this state, the same notification touching such assessment as required by the statutes, and thereupon: "Such assessors must act in reference to such assessment, and to assessment of any other property of such company taxable in their counties, as they are directed to act in cases of assessment against railroad companies by the state board of assessment."

Section 2145 requires that all property belonging to such companies "which is not required by the provisions of this article to be returned to the state auditor, must be returned to the tax assessor of the county in which it is taxable, and by him assessed as other property in the county is returned and assessed."

The statute is plain and unambiguous in its enumeration of the properties that must be returned to the state auditor: (1) The number of miles of telegraph or telephone wire in the state belonging to such company; (2) the number of poles; (3) the number of batteries; (4) the number of instruments; and (5) articles of all kinds, in the state, connected with its business of telephone or telegraph, as the case may be.

(2-4) The state insists that the words, "articles of all kinds in the state, connected with its business," used in section 2143 of the Code, should be construed to refer to and include *only* such articles as poles, batteries, and instruments, under the doctrine of ejusdem generis. This maxim of "ejusdem generis," as that where general words follow the enumeration of a particular class of persons or things the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, has no application to the statute under

[*State v. Western Union Telegraph Co.*]

construction. For the maxim is only an illustration of the broader maxim "noscitur a sociis," as that general specific words which are capable of an analogous meaning, being associated together, take color from each other; so that the general words are restricted to a sense analogous to that of the less general.—Endlich on Interp. Stat. § 400; Broom's Max. 588; 1 Vent. 225. It has never been supposed that, where this rule has application, it is required that the general terms be entirely rejected (*Jenkins v. Thomas*, 4 Term Rep. 666; *State v. Williams*, 2 Strob. Law [S. C.] 474); but that every part of a statute should, if possible, be upheld and given appropriate force (Cooley, Const. Lim. [7th Ed.] p. 91; 2 Lewis' Sutherland Stat. Const. § 380; *State, ex rel. v. Lane*, 181 Ala. 655, 62 South. 31). So it has been declared that when it can be seen that the particular word by which the general word is followed was inserted, not to give coloring to the general word, but for a distinct object, and when, to carry out the purpose of the statute, the general word ought to govern, it is a mistake to allow the ejusdem generis rule to pervert the construction.—*State v. Broderick*, 7 Mo. App. 19. It is then a rule of intention, and where the circumstances show that a reliance upon the rule would defeat rather than effectuate the intention, it must be rejected.—*Williams v. Williams*, 18 Tenn. (10 Yerg.) 20.

In *N. & D. R. Co. v. State*, 129 Ala. 142, 30 South. 619, section 2145 was construed as to assessments of properties belonging to railroads, and the court pertinently remarked: "There is also a provision that 'all property, real or personal,' belonging to a railroad 'which is not required to be returned to the auditor' must be returned to the tax assessor of the county in which it is taxable, and by him assessed as the property of like kind of private citizens of his county. It thus appears, from the very words of the statute and by repeated provisions therein, that the jurisdiction of the state board of assessment to assess any items of railroad property is entirely dependent upon the fact whether, under the law, such items 'are required to be returned to the auditor.' It is of no consequence how indispensable the property may be to the operation of the road, or what its character is. If the railroad is not 'required to return it to the auditor,' the state board is wholly without jurisdiction to assess it, and it must be assessed by the county tax assessor. This is the deliberate and carefully repeated provision of the statute, and the courts have

[State v. Western Union Telegraph Co.]

no power to enlarge or diminish the jurisdiction of the state board, by construction or amendment based upon the supposed incongruity of requiring the right of way to be returned to one tribunal and other property to another."

The statute as to the return to be made by railroad companies to the auditor (section 2133 of the Code) is quite different from section 2143, requiring the return by telegraph and long distance telephone companies, and the decision in the *Nashville & Decatur Railroad Company Case* is not a construction of the statute before us. Construing article 6 in its entirety, we are clear that the legislative intent was to require that return be made to the auditor, by telegraph and telephone companies, of the properties of all kinds connected with the conduct of their business, and that assessment thereof be made by the state board of assessment.—Code 1907, pp. 878, 882.

The restricted construction placed on the statute before the court in *Greenville Ice & Coal Co. v. City of Greenville*, 69 Miss. 86, 10 South. 574, was proper, in dealing with exemptions from taxation, and the purpose for which the statute was enacted. The court said: "We nowhere find in the act any words or provisions indicative of a clear legislative purpose to extend the exemption further than the specifically enumerated cases and others of like character."

In that case a strict construction of the statute was required. In the case of *Alabama v. Montague*, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. Ed. 1000, the Supreme Court had under consideration a mortgage to secure railroad bonds, and interpreted the words "all other property," as there used. The mortgage after specifically describing certain properties, proceeded: "Also the telegraph line and telegraph offices along the line of said road belonging to said company; also the machine shops and all other property in said states of Alabama, Georgia, Tennessee, and Mississippi belonging to said company."

The court held that the words "all other property" covered everything connected with the telegraph offices and machine shops, and were specially limited to that part of the instrument in which they appeared. The court said (117 U. S. at page 609, 6 Sup. Ct. at page 913, 29 L. Ed. 1003): "These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded

[State v. Western Union Telegraph Co.]

them, have their appropriate use in the precise place where they are found. We say they are there appropriate because, in conveying the telegraph offices, the machine shops, the coal mines, the iron mines, and the manufacturing establishments, there might in them be found much property belonging to the company about which a doubt would arise whether it was a part of these offices, mines, machine shops, and manufacturing establishments. All such doubt or ambiguity is removed by declaring that all the property of the grantors in these places, or used in any of these pursuits, is conveyed. For this purpose the phrase 'all other property' is apt, and is used in the right place in a description designedly minute and elaborate. It is among its kind, ejusdem generis, and its purpose is answered when its use is limited to explain the other words in this immediate connection."

In the present case the words of the statute, "and articles of all kinds," must be read in connection with the succeeding words, "connected with its business." The "articles of all kinds" are limited to those "connected with its business," and thereby all doubt and ambiguity is removed.

The expression in *Cloverdale Homes v. Town of Cloverdale*, 182 Ala. 431, 62 South. 712, 47 L. R. A. (N. S.) 607, cited by appellant, was but the general statement of the rule in Endlich on Interpretation of Statutes, p. 151, § 113, to the effect that general words and phrases however wide and comprehensive in their liberal sense, must be construed as strictly limited to the immediate objects of the act, and not as altering the general principles of the law; i. e., they are to be construed as near the use and reason of the prior law as may be, without violation of their obvious meaning. The principle of statutory construction applied in the *Cloverdale Homes Case* was that with reference to a statute that changed the then existing law, and it has no application to the statute now under construction.

When the statute in question was framed, the Legislature knew how the business of telegraph and long-distance telephone companies was conducted, and the statute enumerated the several instruments used in the transmission of messages. There were of necessity other properties of such companies, such as office fixtures and furniture, which were not specifically enumerated in the statute, but were of necessary and general use in the business of transmitting and receiving messages, and which were

[Thrasher, et al. v. Neeley.]

intended to be embraced in the expression, "articles of all kinds, in the state, connected with its business," specifying the items of property to be returned to the state auditor under section 2143, and assessed by the state board of assessment.

No error appearing in the ruling of the trial court on the demurrer, the cause is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Thrasher, et al. v. Neeley.

Action on Sheriff's Bond.

(Decided May 11, 1916. 72 South. 115.)

1. **Sheriffs and Constables; Indemnitors; Evidence.**—Where plaintiff claimed in trespass and trover, and also alleged the destruction of his landlord's lien, the action being against the obligors on an indemnity bond to the sheriff to procure the levy of an execution, the indemnity bond was admissible.

2. **Subrogation; Right of Surety; Payment.**—Where plaintiff signed a mortgage for the purchase price of a mule bought by his principal, the debtor in the judgment, as the surety only, and after the law day of the mortgage had passed, paid the amount due on the mortgage, which was marked paid, and thereafter judgment was obtained against the principal debtor, and the mule was taken under execution on the judgment, plaintiff was entitled to the mule, being subrogated to the rights of the mortgagee under §§ 5389 and 5394, Code 1907.

3. **Sheriffs and Constables; Indemnitors; Jury Question.**—Where plaintiff claimed that his landlord's lien was destroyed by a sale of the property under execution, the action being against the indemnitors of the sheriff, proof that the property was sold under attachment without notice of the lien, and that its whereabouts were unknown to plaintiff, entitled plaintiff to go to the jury.

4. **Charge of Court; Instruction.**—In construing instructions the charge should be considered as a whole.

5. **Subrogation; Right to; Effect.**—Under § 5394, Code 1907, a surety who paid a chattel mortgage is entitled to subrogation, as to other creditors of his principal, although he did not have the mortgage transferred to him as authorized by § 5285, Code 1907, and hence, might not have priority as to innocent purchasers.

(Sayre, J., dissents.)

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

[Thrasher, et al. v. Neeley.]

Action by R. F. Neely against G. W. Thrasher and others, as indemnitors by bond to the sheriff to procure the levy of an execution. Judgment for plaintiff and defendants appeal. Affirmed.

Transferred from the Court of Appeals.

CULLI & MARTIN, for appellant. E. O. McCORD, for appellee.

GARDNER, J.—Suit by appellee against appellants, who were obligors on an indemnity bond to the sheriff of Etowah county, executed for the purpose of procuring a levy on certain personal property in the possession of one J. H. Neely, by virtue of an execution in favor of one of the appellants, G. W. Thrasher, issued out of a justice court against said J. H. Neely. The property levied on was one mule and thirty bushels of corn, and constituted the subject of this controversy.

Counts 1 and 2 were in trespass and trover respectively. Count 5 was in case, for the destruction of a landlord's lien. Count 6, which related only to the mule in controversy, relied for recovery upon the destruction of what the count designates as a lien which the plaintiff had by virtue of the fact that he had signed, as surety only, a mortgage with J. H. Neely for the purchase of said mule, which said mortgage plaintiff paid after the same became due, and thereby became the owner of said indebtedness as such surety. The cause proceeded to trial upon these counts and the general issue thereto.

(1) Objection was made to the introduction of the indemnity bond, which was overruled. The objection was clearly without merit.—*Reeves v. McNeill*, 127 Ala. 175, 28 South. 623; *Screws v. Watson*, 48 Ala. 628.

(2) It was the insistence of the plaintiff that he paid to the appellant J. H. Snead, to whom the mortgage on the mule was given by J. H. Neely, as principal, and plaintiff, as surety, the said mortgage debt out of his own funds, and that the mortgagee surrendered the mortgage to him, and which he marked "Paid."

Defendants objected to the introduction of this mortgage, and we are of the opinion that the objection was properly overruled. The following provisions of our Code are pertinent to this theory of the case of the plaintiff: "5389. *Proof of Suretyship*.—If the fact of suretyship does not appear on the face of the

[Thrasher, et al. v. Neeley.]

contract, it may be proved by parol, either before or after the judgment."

"5394. *Subrogation*.—A surety who has paid the debt of his principal is subrogated, both at law and in equity, to all the rights of the creditor, and in a controversy with other creditors, ranks in dignity the same as the creditor whose claim is paid."

"5385. *Rights of Surety Who Has Paid Debt*.—A surety who has paid his principal's debt is entitled to a transfer of the original and collateral security which the creditor holds; he has all the rights to realize thereon and to reimburse himself to the same extent as the creditor might have done before the surety paid him, whether paid before or after judgment or decree. He shall be substituted for the creditor and subrogated to all his rights and remedies; in effect, he shall be a purchaser of the debt and all its incidents."

The above section 5394 is an exact copy of the statute law of Georgia. See section 2995, Code of Georgia 1895, and authorities cited thereunder; also, in this connection, *Wilkins, etc., v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

As to the mule, it was the theory of the plaintiff that, having as surety paid the mortgage debt, he was subrogated in law to the rights of the mortgagee by virtue of the above quoted statutory provisions, and that his rights, in a controversy with these defendants, were of the same rank and dignity as those of the mortgagee.

Plaintiff and J. H. Neely are brothers. It was further insisted by plaintiff that he rented a certain tract of land for the years 1913-14 from appellant J. H. Snead, and that he sub-rented a portion thereof to his brother, J. H. Neely. There was some evidence tending to show that he advanced the corn seized under the writ to his brother, as his tenant, and let him have also the use of the mule for a portion of the crop. There was also some evidence from which the jury could infer that he gave the corn to his brother. There was evidence on the part of plaintiff to show sufficient notice to defendants to put them on inquiry as to his right and title to the property seized, in addition to the fact that they were required by the sheriff to execute the indemnity bond before levy could be made, and defendant Snead was the former holder of the mortgage on said mule. Snead insisted that the land was rented, not to plaintiff alone, but to plaintiff and his brother; and, while he does not deny, it seems,

[Thrasher, et al. v. Neeley.]

the suretyship of the plaintiff on the mortgage for the mule, yet he most earnestly denies that this mortgage was paid by the plaintiff, and testifies that it was paid by J. H. Neely himself.

It is insisted by counsel for appellants that they were entitled to the affirmative charge as to each count. As to the counts for trespass and trover, it is the insistence that the evidence fails to show that plaintiff had the right of property, general or special, and the possession or the immediate right of possession, at the time of the alleged taking.—*Johnson v. Wilson*, 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52; *Cook v. Thornton*, 109 Ala. 523, 20 South. 14. If the testimony of the plaintiff is to be believed, however, he had the same rights as the mortgagee to the mule in controversy; the law day of the mortgage having passed, and he, as surety, having paid the amount due thereon. The defendants were therefore not entitled to the affirmative charge as to these counts.—*Johnson v. Wilson*, *supra*.

(3) The tendencies of the testimony as to the advancement by the plaintiff to his brother, and the relation of landlord and tenant existing between them, according to the plaintiff's insistence, were sufficient for the submission of that question to the jury on the counts declaring for the destruction of the lien. Appellant's counsel insist, however, that there is no proof tending to show that the lien was destroyed; but this insistence overlooks that part of the evidence which shows a sale of this property under execution, for a valuable consideration, to strangers to this cause and to this transaction, and sufficient evidence from which the jury could infer that these purchasers had no notice of the plaintiff's lien.—*Waite v. Corbin*, 109 Ala. 154, 19 South. 505. In addition to this, there was some evidence from which the jury might also infer that the whereabouts of the property was unknown to the plaintiff.—*Clark v. Johnson & Lattimer*, 7 Ala. App. 507, 61 South. 34.

(4, 5) Nor do we find reversible error in that portion of the oral charge excepted to by defendants. The court, in its oral charge to the jury, fully presented the issues in the case, and this excerpt must be read in the light of the whole charge. It is insisted that this portion of the charge of the court overlooked the fact that the mortgage had been marked "Paid," and surrendered, in the presence of the plaintiff, he raising no objection thereto. This criticism is clearly without merit. We see no occasion for the introduction of any principle of estoppel, and it was

[Thrasher, et al. v. Neeley.]

the insistence of the plaintiff that the mortgage was paid by, and surrendered to him. The charge of the court merely authorized a recovery in the event the jury found the transaction in accordance with the plaintiff's theory.

It is further insisted that the plaintiff acquired no rights which he could here enforce, by virtue of the payment of said mortgage, as he did not have the mortgage transferred to himself as provided by section 5385 of the Code. Whatever may be the rights of innocent third persons, we are clear to the view that the other provisions of the Code, above quoted, clothed the plaintiff with the rights of the mortgagee as against these defendants, obligors on the indemnity bond.

There are presented questions of evidence other than those here considered, as well as a few remaining charges. We do not think it would serve any useful purpose to further treat in detail each assignment of error and each question presented. Suffice it to say the record has been carefully examined, and these assignments of error given most careful consideration. We do not find in any of them any prejudicial error calling for a reversal of this case.

The judgment of the court below is accordingly affirmed.
Affirmed.

ANDERSON, C. J., and MCCLELLAN, MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur. SAYRE, J., dissents.

MCCLELLAN, J.—(concurring).—The right this plaintiff would assert and vindicate, in the court of law, is predicated of the provisions of Code, § 5394 (new to our statute law), which reads:

"A surety who has paid the debt of his principal is subrogated, both at law and in equity, to all the rights of the creditor, and in a controversy with other creditors, ranks in dignity the same as the creditor whose claim is paid."

This section, as well as section 5392 and some others forming that article, was taken, literally, from the Code of the state of Georgia.—Code of Georgia 1910, §§ 3561, 3567. Section 5385 of our Code of 1907 seems to have been taken, in substance from section 3732 of Code of 1906 of the state of Mississippi.

At first I was disposed to think that the section above quoted exacted, as a condition precedent to its benefit, the "payment"

[Neeley v. Reynolds.]

by the surety of the whole debt to discharge which he had become obligated. If I properly interpret the ground and the effect of the decision of the Supreme Court of Georgia in *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653, et seq., in definition of the purpose and effect of the provisions of its law now forming section 5394, quoted above, the benefits thereof is not restricted to sureties who "pay" the whole debt, but, to the contrary, that the statute's (section 5394) provisions are available to a surety who "pays" a part only of the debt, and that to the extent of his surrender of value to the owner or holder of the debt for which he is surety he becomes the assignee (is substituted for the creditor) of the contract to discharge which he has parted with value, provided, of course, the full sum the owner or holder could demand under the contract has been received by the owner or holder.

The adoption of this statute by our lawmakers in the exact terms in which the sister state had theretofore made it law operated to import, at least presumptively, into the statute as we have it the settled construction put upon it by the Supreme Court of that state.—36 Cyc. p. 1154 et seq.; *Armstrong v. Armstrong*, 29 Ala. 538; *Bailey v. Bailey*, 35 Ala. 687—among others.

I therefore feel constrained to take the statute as it has been construed in the state of its parentage, and so concur in the result pronounced on this appeal.

Neeley v. Reynolds.

Detinue.

(Decided May 18, 1916. 72 South. 124.)

1. **Mortgages; Recordation; Effect.**—Where a mortgagor gave plaintiff a mortgage of date Feb. 8, 1909, which was not recorded until Feb. 16, 1909, and also gave defendant a mortgage of date Feb. 11, 1909, which was recorded Feb. 12, 1909, and defendant took his mortgage without notice of plaintiff's mortgage, defendant's mortgage was superior to plaintiff.

2. **Same; Detinue; Priority.**—Where the action was detinue, and both parties claimed as mortgagees of the same mortgagor, and the issue was whether or not defendant had actual notice of plaintiff's unrecorded mortgage when he took his own, the refusal of a charge embodying a correct statement of the law on the point strictly applicable to the issues and facts, was reversible error.

[Nesley v. Reynolds.]

3. **Appeal and Error; Harmless Error; Evidence.**—It is harmless error to plaintiff to give for defendant at his request a charge requiring a higher degree of proof from him, than was legally necessary.

4. **Mortgages; Recordation; Actual Notice.**—Notice is equivalent to registration, and a subsequent encumbrancer or purchaser with notice, cannot avoid the lien of the unrecorded mortgage, although the mortgage may be declared void by statute unless duly registered.

APPEAL from Lawrence Circuit Court.

Heard before Hon. R. C. BRICKELL.

Action by E. D. Reynolds against S. P. Neely, in trover, trespass and detinue. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Transferred from the Court of Appeals.

C. M. SHERROD, for appellant. D. C. ALMON, and TIDWELL & SAMPLE, for appellee.

MAYFIELD, J.—The action was detinue, by appellee against appellant, to recover two mules. To the count in detinue were added counts in trover and in trespass, but no questions are presented as to these additional counts. The defendant, among his defenses, suggested that plaintiff's claim was based on a mortgage, and requested that the amount of the mortgage debt be ascertained as is authorized by section 3789 et seq. of the Code. The case was tried on the general issue and the suggestion as above described. A verdict was rendered for the plaintiff for the mules sued for, and the balance of the mortgage debt was ascertained to be \$100. From the judgment, defendant appeals.

It appears that plaintiff's sole claim was based upon two mortgages. The first was executed in 1908 by one Sam Gray, to defendant, appellant here, to secure an indebtedness of \$400, which mortgage was later transferred and assigned by appellant to appellee, but without recourse. The second mortgage was executed in 1909, by Sam Gray direct to appellee, to secure \$585. This last mortgage was executed on the 8th day of February, 1909, but was not recorded until the 16th day of February, 1909. Between these dates of the execution and the recordation, the mortgagor, Gray, executed a mortgage to appellant, on the same property, to secure \$166, and this mortgage was recorded four days before appellee's last mortgage. This mortgage to appellant, however, recited that there was no incumbrance on the property except a mortgage to appellee, not particularly de-

[Neeley v. Reynolds.]

scribing any mortgage. It appears without dispute that both parties claim through Sam Gray and both claim solely as mortgagees.

The defenses insisted upon are payment of the first mortgage, and bona fide purchaser for value without notice of the second mortgage, which is claimed to be void under our registration statutes as against appellant, who claims to be mortgagee without notice of the unrecorded mortgage.

As to the payment of the first mortgage, the evidence was in dispute; but it was without dispute that the mortgagor had paid appellee enough to satisfy the first mortgage if the payments had been applied to the mortgage debt. The real dispute was as to the application of the payments.

As to the second defense, the disputed question was whether or not appellant had actual notice of the unrecorded mortgage when he took his mortgage. If the recital in appellant's mortgage, of a mortgage to appellee, referred to the last mortgage, then of course appellee's mortgage would be subject and second to appellee's unrecorded mortgage; but if, as testified to by appellant and Sam Gray, it referred to the mortgage executed in 1908, and assigned to appellee by appellant, and not to the unrecorded one, then appellant's mortgage is prior and paramount to appellee's last mortgage.

(1-3) This we deem the real disputed question. As to this issue the appellant requested the following written charge: "I charge you, gentlemen of the jury, that if you believe from the evidence in this case that Sam Gray gave Reynolds a mortgage for \$585 on the 8th day of February, 1909, which mortgage was not recorded until the 16th day of February, 1909, and that the said Sam Gray gave Neely a mortgage for \$166 on the 11th day of February, 1909, which was recorded on the records of Lawrence county, Ala., on the 12th day of February, 1909, and that at the time Neely took such mortgage he had no notice or knowledge of the said Reynolds mortgage, then Neely's mortgage is superior to the Reynolds mortgage."

This charge appears to be a correct statement of the law which was strictly applicable to the issues and facts, and its refusal was reversible. While it may have required a higher degree of proof than was necessary, yet this was against the party requesting it, and could not have injured appellee.

[Martin v. State.]

(4) The object of statutes requiring the registration of mortgages is the prevention of fraud, and in the advancement of that end the letter of the statute often yields to its spirit. Thus, though a mortgage may be by statute declared void, unless it is duly registered, it has always been held that notice is equivalent to registration, and that a subsequent incumbrancer or purchaser with notice cannot avoid the lien of the mortgage because it was not recorded.—*Fenno, et al. v. Sayre & Converse*, 3 Ala. 458; *Dearing v. Watkins*, 16 Ala. 20; *Smith & Co. v. Zurcher*, 9 Ala. 208; *Ohio L. I. & T. Co. v. Ledyard*, 8 Ala. 866; *Boyd v. Beck*, 29 Ala. 703; *Wyatt v. Stewart*, 34 Ala. 716; 4 Mayf. Dig. 207.

We deem it unnecessary to notice other assignments.
Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Martin v. State.

Murder.

(Decided January 13, 1916. Rehearing denied February 10, 1913.
71 South. 693.)

1. **Homicide; Dying Declarations; Admissibility.**—Where the deceased survived the shooting about eighteen hours, and when conscious that he could not recover, made statements to the effect that defendant had shot him, and in response to questions propounded when he realized that he was near death, made statements while defendant was present, that defendant had shot him, such statements were admissible as dying declarations.

2. **Same.**—In such a case the substance of decedent's statement designating defendant as his assailant, was admissible.

3. **Charge of Court; Reasonable Doubt.**—A charge that if any one of the jury had a reasonable doubt of the guilt of defendant from the evidence, the jury should give the benefit of the doubt to defendant, and not convict him, would impose upon the rest of the jury the reasonable doubt entertained by only one juror, and its refusal was proper.

4. **Same; Involving no Proposition of Law.**—A charge instructing that the jury must construe every reasonable doubt in favor of defendant, was properly refused as stating no proposition of law, since a reasonable doubt cannot be construed.

5. **Same; Presumption of Innocence.**—A charge asserting that the burden of proof was not shifted from the state to the defendant, and that the

[Martin v. State.]

presumption of innocence continued with defendant until the evidence convinced the jury that he could not be guiltless, and that unless that was done, they should acquit, was faulty, as tending to mislead the jury to conclude that defendant could not be convicted unless the jury were absolutely convinced of his guilt.

APPEAL from Jefferson Criminal Court.

Heard before Hon. WM. E. FORT.

Sam Martin was convicted of murder in the first degree, and he appeals. Affirmed.

The facts sufficiently appear. The following charges were refused to defendant:

(4) The jury must construe every reasonable doubt in favor of defendant.

(8) If any member of the jury have a reasonable doubt of the guilt of defendant from the evidence, the jury will give the benefit of the doubt to defendant, and not return a verdict of guilty.

(11) In this cause the burden of proof is not shifted from the state to defendant, and the presumption of innocence abides with defendant until the evidence in the cause convinces the jury that the defendant cannot be guiltless, and unless that is done, you should acquit him.

FRANK S. ANDRESS, for appellant. WM. L. MARTIN, Attorney General, and HUGO L. BLACK, for appellee.

MCCLELLAN, J.—The appellant was adjudged guilty of murder in the first degree, and was sentenced to suffer death. The victim was James Little. Little was assassinated when he opened a door in the house of one Garret. The only issue in the case was whether the defendant was the assassin.

(1, 2) Little survived the shot about 18 hours. After ample proof that Little was conscious of his impending dissolution, the prosecution was allowed to show several statements made by Little in which he said the defendant was his assailant. After Little had been taken to a hospital in Birmingham, and at a time when the evidence tended to show that he realized he was near death, the defendant was brought into his presence; and, thereupon, in response to a question, designated the defendant as the one who shot him. There was also evidence tending to show that the defendant, in whose actual presence Little thus accused

[Reynolds, et al. v. State.]

him, made no denial or other statement. The statements attributed to Little in this connection were patently admissible as dying declarations. That the substance of Little's accusing statement, designating the defendant as his assailant, was admissible, is too clear for doubt.—*Yarbrough v. State*, 105 Ala. 43, 16 South. 758. There was no error in any of the rulings on the evidence.

(3) Charge numbered 8, requested for the defendant, was correctly refused, since it would have imposed upon the remainder of the jury the acceptance of the reasonable doubt entertained by only one member of the jury. It is a different instruction from those considered in *Hale's Case*, 122 Ala. 85, 26 South. 236, and other of our decisions in that line.

(4) Charge numbered 4 stated no proposition of law. It is not possible to "construe" a reasonable doubt.

(5) Charge numbered 11, requested for the defendant, was faulty, in that it was capable of misleading the jury to the conclusion that the defendant could not be convicted, unless the jury was absolutely convinced of his guilt, and thus inculcating the idea that a higher degree of certainty than that the law in fact requires was exacted to justify a conviction in a criminal case.

Justices MAYFIELD and SAYRE are of the opinion that the charge was faulty in its statement that the burden of proof did not shift from the state to the defendant; it being their opinion that the state discharged its burden, *prima facie*, with respect to proof of malice, when it was shown that the deceased was killed by the use of a deadly weapon.

No error appearing, the judgment must be affirmed.

Affirmed. All the Justices concur.

Reynolds, et al. v. State.

Murder.

(Decided May 11, 1916. 72 South. 20.)

1. Charge of Court; Corrupt Swearing.—Where there was evidence tending to show that a witness gave willful or corruptly false testimony as to a material fact, it was error to refuse a charge that if the jury found he gave such false testimony, they might disregard his entire testimony.

[Reynolds, et al. v. State.]

2. **Same; Credibility of Witness.**—Where there was evidence that a witness had made contradictory statements concerning material facts, it was error to refuse to instruct the jury that they might consider such statement in determining the weight of the witness's testimony; § 5364, Code 1907, as amended by Acts 1915, p. 815, not applying.

(McClellan, J., dissents in part.)

APPEAL from Bibb Circuit Court.

Heard before Hon. B. M. MILLER.

Morris Reynolds, Arthur Glass, and Hubbard Glass were convicted of the murder of Scott Craddock, and they appeal. Reversed and remanded.

The following charges were refused to defendants:

(1) If the witness John Allen made the statement in writing to Reuben Reynolds and Frank Fallon, admitted in evidence, then the jury may take into consideration the making of such statement in determining what weight they will give to the testimony in this case of John Allen as testified to by him.

(2) If the jury believe from the evidence that the witness Minnie Booth has willfully or corruptly sworn falsely to any material facts in evidence, then the jury may, in its discretion, disregard the evidence of such witness entirely.

(3) If the jury believe from the evidence that the witness Minnie Booth testified at the coroner's inquest that both Arthur and Hubbard Glass fired at Scott Craddock, and, further, that the said Minnie Booth testified on the coroner's inquest that Scott Craddock called three times to the defendants in their buggy to stop before they stopped on the occasion of his killing, then the jury may take such testimony into consideration in determining what weight they will give to the testimony of Minnie Booth as given in this case.

(15) If you believe from the evidence that the witness John Allen has testified willfully, falsely to any material fact, then you in your discretion may disregard his testimony.

ELLISON & DOMINICK, MIDDLETON & REYNOLDS and I. M. ENGEL, for appellant. WILLIAM L. MARTIN, Attorney General, and P. W. TURNER, Assistant Attorney General, for the State.

SAYRE, J.—(1) Defendants were convicted of murder in the second degree, and each of them sentenced to confinement in the penitentiary for 30 years. After due consideration we find that the judgment must be reversed for the court's refusal of

[Reynolds, et al. v. State.]

charges numbered, 1, 2, 3, and 15 in the record. The case is interesting; but in view of the fact that another trial will be ordered, we do not propose to discuss the evidence. It will be enough to say that the hypotheses of these charges were supported by tendencies of the evidence, and in the peculiar circumstances of the case they may have been of peculiar and legitimate value to defendants. Some of the cases in which this court has approved charges in substantially the language of charges 2 and 15 in this record have been collected by the Court of Appeals in *Pearson v. State*, 13 Ala. App. 181, 69 South. 485, to which we refer. Others to the same effect were noted by this court in the recent case of *Carpenter v. State*, 193 Ala. 51, 69 South. 531, in which this court followed the settled rule in respect to such instructions.—*Barker v. T. C., I. Co.*, 189 Ala. 579, 66 South. 600.

(2) Charges substantially like those numbered 1 and 3 in this record have had uniform approval in this court. There was evidence going to show that the witnesses to whom these charges refer had made contradictory statements concerning material facts in the case. They should have been given.—*Hale v. State*, 122 Ala. 85, 26 South. 236, where previous rulings are cited. In *Birmingham Ry. v. Glenn*, 179 Ala. 263, 60 South. 111, where many of the cases on this subject are collected, this court said:

"The principle of these cases is that where particular evidence is offered for a particular and limited purpose, collateral to the main issue, as in the case of all impeaching or discrediting evidence, parties have a right to have its proper function and its limited operation presented to the jury by an appropriate instruction."

In our consideration of these charges we have not been unmindful of the amendment of section 5364 of the Code, approved September 25, 1915; Acts 1915, p. 815. As amended, the section still requires that: "Charges moved for by either party * * * must be given or refused in the terms in which they are written."

It further provides that: "The refusal of a charge though a correct statement of the law shall not be cause for a reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's general charge or in charges given at the request of parties."

The rule of law invoked by the charges in question was not stated by the court in its general charge to the jury nor in any

[Reynolds, et al. v. State.]

of the numerous charges given at the request of the defendants. Defendants were entitled under our uniform rulings to have the proper function and limited operation of the impeaching evidence in this case presented to the jury.

Other questions reserved have been duly considered. They are not of any particular interest, and we prefer not to enter upon that statement of the evidence which a discussion of them would involve. Apart from the refusal of the charges mentioned above we find no error.

Reversed and remanded.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur in the opinion.

ANDERSON, C. J., and GARDNER, J., concur in the reversal on charges 2 and 15, and think charges 1 and 3 may be given on a second trial without prejudice to the state, but are not prepared to say refusal of them was reversible error. MCCLELLAN, J., agrees to reversal on charge 2, and holds there was no error in the refusal of the other charges in question.

MCCLELLAN, J.—I concur in the view that previous decisions of this court require the conclusion that the trial court erred in refusing charge numbered 2, requested for the defendants.

I do not concur in the view, prevailing with the majority of the court, with respect to charges numbered 1, 3, and 15. In my opinion charge numbered 1 was due to be refused for these reasons: (a) That it did not purport on its face to deal with any contradictory statement made by John Allen in writing to Reynolds and Fallon; (b) and so it was faulty and was due to be refused because its effect was to single out and give undue prominence to a particular part or feature of the evidence; (c) the mere fact, as the charge itself solely hypothesizes, that Allen made "a statement" in writing to Reynolds and Fallon—instead of an assertion or assertions to them contradictory, upon material matters, of what he had testified on the trial—could not become a basis for a conclusion, by the jury, unfavorable to Allen's credibility. It was what he said, material to the issues, and not the mere fact that he made a statement, that could become of value or importance in the jury's discharge of its function.

[Madison v. State.]

Charge numbered 3 was due to be refused for the two reasons first above assigned against charge 1. The draughtsman of the charge (3) should not have left it in any doubt that he sought to have the jury advised as upon the theory that the witness Booth made utterances, on a previous occasion, which her testimony on that trial contradicted in a material respect.

Charge numbered 15, refused to the defendants, was so formed as to be equivocal, ambiguous in this: The soundness, strength, and effect of hypothesis therein was made to depend upon the significance to be attributed to the comma between the words *willfully* and *falsely*: If the comma had the effect to interpolate the conjunctive, *and*, the hypothesis was efficient; but if its effect was to interpolate the disjunctive *or*, then the charge was patently faulty, for to *willfully* testify to a material fact affords no ground or reason to disregard that or any other material fact testified by the witness.

In the consideration of these charges the writer has applied the long-established rule in this state, viz.: That a trial court may refuse, without error, any specially requested instruction that is ambiguous, or that is not certain, clear, and explicit in its language, or that is vague and obscure in its meaning.—38 Cyc. pp. 1598-1600, and notes citing some of our cases. There is no duty of a trial court to alter, reform, or modify a requested special instruction.—*McGehee v. State*, 52 Ala. 226.

Madison v. State.

Murder.

(Decided April 6, 1916. 71 South. 706.)

1. Courts; Opinion; Statutes.—Under § 5999, Code 1907, as amended by Acts 1915, p. 595, questions presented by charges refused to defendant on his trial for homicide which involved no new principle of law, require no separate treatment in the opinion on appeal.

2. Homicide; Self Defense.—Charges based on the theory of self defense which premit the duty to retreat are faulty.

3. Same; Place.—The fact that at the time of the shooting defendant was in a public road, made no change in the rule as to his duty to retreat.

4. Same; Freedom from Fault.—Where it clearly appeared that the person slain made a sudden and entirely unprovoked attack upon the defendant

[Madison v. State.]

with a deadly weapon, and was in the act of effecting upon defendant such murderous purpose, no duty to retreat rested on defendant.

5. **Same.**—Charges upon self defense which failed to hypothesize defendant's freedom from fault in bringing on the difficulty, were properly refused.

6. **Same; Abandonment of Difficulty.**—Where the evidence showed that deceased and defendant had some dispute two hours previous to the fatal encounter in which deceased threatened an assault upon defendant, and defendant thereupon went to his home and subsequently and voluntarily returned and called deceased out of the house, it afforded no ground for instructions on the theory that defendant abandoned the difficulty.

7. **Charge of Court; Argumentative.**—It is proper to refuse instructions which are argumentative.

8. **Same; Undue Emphasis.**—It is proper to refuse charges which give undue emphasis or prominence to particular portions of the evidence.

9. **Same; Covered by Those Given.**—It is not error to refuse charges covered by written charges given.

APPEAL from Lawrence Circuit Court.

Heard before Hon. R. C. BRICKELL.

Joe Madison was convicted of murder in the second degree and he appeals. Affirmed.

R. L. ALMON, and W. H. LONG, JR., for appellant. W. L. MARTIN, Attorney General, and HARWELL G. DAVIS, Assistant Attorney General, for the State.

GARDNER, J.—Appellant was convicted of murder in the second degree, and sentenced to imprisonment for a period of 35 years. He sought to justify the killing upon the theory of self-defense. No questions are presented for review upon the evidence in the case. The record contains a large number of special charges, both given and refused, none of which are numbered. The oral charge of the court does not appear in the record. The bill of exceptions merely states that: "The presiding judge thereupon charged the jury the law as to the various phases of the case."

(1, 2) The questions presented by the refused charges involve no new principle of law and need no separate treatment here.—Acts 1915, p. 595. Some of them, based upon the theory of self-defense, are faulty in pretermittting the duty to retreat.

(3) From some of the argument and the language of some of the charges it would seem to be one of the contentions that the fact that the defendant at the time of the firing of the fatal

[Madison v. State.]

shot was in the public road worked a change in the rule as to his duty to retreat. This, however, is not the case.—*Brake v. State*, 8 Ala. App. 101, 63 South. 11, and cases there cited.

(4) Other charges of like character, pretermittting the duty to retreat, were evidently framed to come within the language used in *Storey's Case*, 71 Ala. 329, wherein reference was made to an assault that was "manifestly felonious in its purpose and forcible in its nature," and to the doctrine of retreat. What was said in *Storey's Case* has received comment and explanation in the recent case of *Matthews v. State*, 192 Ala. 1, 68 South. 334. See also *Hutcheson v. State*, 170 Ala. 29, 54 South. 119, and *Beasley v. State*, 181 Ala. 28, 61 South. 259. Speaking of the exception to the general rule as to the duty to retreat, this court, in *Matthews v. State*, *supra*, said: "The exception mentioned is where the party slain by the defendant made a sudden, entirely unprovoked, murderous attack upon the defendant; the assailant being then armed with a deadly weapon, and in the very act of effecting upon the defendant such murderous purpose. In such case, where the evidence is clear, and without conflict or adverse inference, the law concludes that no duty to retreat rests on the defendant; its theory being that, under such circumstances, retreat would not serve the humane purpose the law intends to subserve by its exaction of one, wholly without fault in the premises, unless immediately and suddenly menaced by an adversary."

We have carefully considered the testimony in this case, and think it too clear for argument that it lacks the essential elements of the case quoted from above, and that the doctrine of the *Storey Case*, as above qualified and explained, is therefore without application here.

(5) Some of the charges, while hypothesizing that defendant approached the deceased in an orderly and peaceful manner, yet otherwise fail to hypothesize freedom from fault in bringing on the difficulty.—*Scoggins v. State*, 120 Ala. 369, 25 South. 180.

(6) Other charges seem to be based upon the theory of an abandonment of the difficulty by the defendant, although he might have been at fault in bringing it on. But there is nothing in the evidence to support that theory. There is testimony to show that the defendant and the deceased had some dispute, two hours previous to the fatal encounter, in which deceased threatened an assault upon defendant, and that thereupon the latter went to his home, and subsequently returned, of his own volition,

[Dawson v. State.]

and called deceased out of his house. There was clearly nothing in this state of the facts involving the doctrine of abandonment of the difficulty, as contended for by such charges.

(7-9) Many other charges were correctly refused, for being argumentative, or giving undue prominence to portions of the evidence; and some of them were substantially covered by special given charges. Each of the refused charges has been by us given most careful consideration, and in the action of the court thereon we find no reversible error.

An examination of this record fails to disclose any reversible error, and the judgment of conviction is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Dawson v. State.

Murder.

(Decided April 13, 1916. 71 South. 722.)

1. **Statutes; Construction.**—Local Acts 1915, p. 20, is not violative of the Constitution either of § 104 or § 106, the publication of the intent to apply therefor having been published only in Marengo county, since the holding of the court in that county and its detachment from the first circuit in no manner affected the other counties in the district.

2. **Clerks of Courts; Statute; Instruction.**—Under § 6, Local Laws 1909, amended by Local Laws 1915, p. 62, and Local Laws 1915, p. 20, the person occupying the position of circuit clerk was still ex officio clerk of the law and equity court, as it is the duty of the court in construing legislative enactments with doubtful meaning to carry out the legislative intent, at the time of the approval of the amendatory act.

3. **Charge of Court; Reasonable Doubt.**—Supposition has no legitimate sphere or habitation in judicial procedure, and hence, a charge asserting that the jury cannot find defendant guilty unless they believe him guilty beyond all reasonable supposition, was properly refused.

4. **Criminal Law; Appeal; Duty of Court.**—It is the duty of the court on an appeal in a criminal case, after giving careful consideration to questions raised and insisted upon by counsel in argument, to also give careful consideration to all other questions presented by the record.

APPEAL from Marengo Law and Equity Court.

Heard before Hon. E. J. GILDER.

[Dawson v. State.]

Tommy Dawson was convicted of murder and he appeals. Affirmed.

GEORGE PEGRAM, for appellant. W. L. MARTIN, Attorney General, and LAWRENCE E. BROWN, Assistant Attorney General, for the State.

GARDNER, J.—The indictment in this case was preferred by the grand jury of the circuit court of Marengo county. The trial of the defendant took place in the Marengo law and equity court; the case having been transferred to the docket of that court by virtue of an act of the Legislature approved February 11, 1915, being House Bill 534.—Loc. Laws 1915, p. 20. Motion was made by the defendant to strike the indictment from the files of said court on the ground that the case had not been transferred with his consent.

(1) The Marengo law and equity court was established by an act approved August 26, 1909 (General and Local Acts [S. S.] 1909, p. 339). Section 19 of said act provides that, when an indictment has been found in the circuit court, the Marengo law and equity court shall not entertain jurisdiction of the case, except upon the transfer thereof to said court, and section 38 of said act provides for the transfer of such cases by agreement of the parties. The act of February 11, 1915, provides for the detachment of the county of Marengo from the First judicial circuit, and further provides that: "All causes pending in the circuit court of Marengo county are hereby transferred to Marengo law and equity court, which Marengo law and equity court is hereby clothed with full and complete jurisdiction to try and determine said causes in all respects as fully as said circuit court of Marengo county had before said transfer."

And the second section provides: "That all laws in conflict herewith are hereby repealed."

The argument of counsel for appellant in support of his motion rests upon his contention that the said act of February 11th is unconstitutional and void as in violation of section 106 of the Constitution of 1901. It is insisted that said act is a local law, and that publication of the intention to apply therefor was had only in the county of Marengo, and that, as the act removed Marengo county from the First judicial circuit, the other counties of this circuit were so affected thereby as that under the

[Dawson v. State.]

provision of the Constitution the publication should have been had in each. That portion of section 106 here pertinent reads as follows:

"No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties."

We are persuaded, however, that the other counties of the First judicial circuit are unaffected, so far as the constitutional provision above quoted is concerned, by the act of February 11th. "The matter or thing to be affected" was the holding of the court in Marengo county and the detachment of said county from the First circuit. The act in no manner affected any of the counties of the circuit, except Marengo, and it was therefore a matter with which the other counties could not be concerned. We think it quite clear that the framers of the Constitution had no intention to require by this section the publication of such notice in every county of a circuit or division when the act is intended to affect only the county which is being detached. If from a chancery division composed of 17 counties it should be decided to detach one county, the argument of counsel for appellant would lead to the result that, to comply with section 106 of the Constitution, such publication would have to be made in each of the 17 counties. Certainly no such unreasonable result can be presumed to have been intended by the framers of the Constitution. We therefore conclude that the act of February 11, 1915, is free from constitutional objection, and that the motion of the defendant was properly overruled.

(2) We find in the record also a motion to quash the venire upon the grounds that the list of names constituting it is not made out by the clerk of the court as required by law, and that the copy of the venire drawn and summoned for the trial of the cause was not properly attested before it was served on the defendant. We do not concede that the motion properly raised the question argued by counsel. Indeed, we are inclined to the contrary view. However, as the question argued and insisted upon

[Dawson v. State.]

is one of general interest to the locality affected, we deem it proper to give an opinion on it. The insistence of counsel appears to be that there was no legally constituted clerk of the Marengo law and equity court at the time of the trial of this case. Under the provisions of section 6 of the act establishing the said court the clerk of the circuit court was declared to be ex officio clerk of the law and equity court. The act establishing the law and equity court was amended in several particulars by an act approved March 17, 1915 (Loc. Laws 1915, p. 62), and which said act amended section 6, in so far as is here pertinent, as follows: "That section 6 of an act entitled 'An act to create and establish the Marengo law and equity court for Marengo county,' approved August 26, 1909, be amended so as to read as follows: Sec. 6. That the present clerk of the circuit court of Marengo county be and he is hereby constituted and appointed clerk of said Marengo law and equity court, and shall hold said office until the next regular election for state officers in the year 1916, and until his successor is elected and qualified, as herein provided. That at said election for state officers in 1916, and every six years thereafter, a clerk of said court shall be elected by the qualified voters of said Marengo county, said clerk so elected to hold office for a term of six years and until his successor is elected and qualified, the term of office of said clerk to commence on the same date as clerks of the circuit courts of this state," etc.

The argument is made that as this act was approved on March 17, 1915, and provided that the clerk of the circuit court should be clerk of the Marengo law and equity court, and that, as on February 11, 1915, an act had been passed which detached said Marengo county from the First judicial circuit, therefore there was no clerk of the circuit court, and consequently the amendment was meaningless and without effect. In this argument, however, counsel overlook entirely the duty of the court, in construing legislative enactments of doubtful meaning, to endeavor to carry out the legislative intent, as the intention of the law-makers is the law.

As previously noted, the act establishing the Marengo law and equity court constituted the clerk of the circuit court ex officio clerk of the new court, and the amendment was intended to designate the person occupying such position of circuit clerk at the time of the detachment of Marengo county from the First circuit, and who was ex officio clerk of the law and equity court

[Dawson v. State.]

at the time of the passage of the amendatory act. At the time of the approval of the act of March 17th, therefore, the said clerk was still clerk of the law and equity court, and, as the act of February 11th had removed Marengo county from the First judicial circuit, the amendment here discussed was clearly for the purpose of providing for the election of the clerk of the law and equity court, for filling any vacancy therein, and for matters of that character necessitated by the withdrawal of said county from the said circuit. We conclude that the legislative intent is entirely clear, and that the contention of counsel for appellant is without merit.

(3) These were the only two questions argued by counsel upon the submission of the cause, but a slight reference was made to the refusal of charge numbered 8, which reads as follows: "You cannot find the defendant guilty unless you believe him guilty beyond all reasonable supposition."

A charge of similar character was condemned by this court in *McCoy v. State*, 170 Ala. 10, 54 South. 428, where a number of cases are referred to, and the following is quoted from the case of *Johnson v. State*, 102 Ala. 1, 16 South. 99, wherein Chief Justice STONE, writing for the court, said: "Supposition has no legitimate sphere or habitation in judicial administration."

See, also, case of *Bert Richardson v. State*, 191 Ala. 21, 68 South. 57.

(4) We have treated all the questions insisted upon by counsel for appellant in his argument of this cause, and find them without merit. Mindful, however, of our duty in cases of this character, we have given careful consideration to the other questions presented by the record. We find in the record no reversible error and nothing deserving of special treatment here.

The judgment of the court below is accordingly affirmed.
Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

[Paitry v. State.]

Paitry v. State.

Murder.

(Decided May 18, 1916. 72 South. 36.)

1. **Appeal and Error; Review; Record; Instructions.**—In the absence of a bill of exceptions the appellate courts cannot intelligently review charges in writing requested by either party, although the charges are set out in the record proper.

2. **Same; Transcript; Contents.**—Where no question was raised before the trial court as to the order of the court for the special venire, or as fixing the day for the trial of defendant, the transcript on appeal should not contain such matters. (§ 6256, Code 1907, as amended by Acts 1915, p. 708.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. WM. E. FORT.

Harry Paitry, alias, etc., was convicted of murder and he appeals. Affirmed.

No counsel marked for appellant. W. L. MARTIN, Attorney General, for the State.

SOMERVILLE, J.—(1) The record in this case contains no bill of exceptions, and we cannot review the action of the trial court in refusing a number of written charges requested by the defendant and set out in the record proper.

(2) This case was tried after September 22, 1915, and, under the provisions of the act approved on that date (Acts 1915, p. 708) amendatory of section 6256 of the Code, the transcript should not have contained the order of the court for the special venire, or fixing the day for the trial of defendant; no question thereon being raised before the trial court. We call attention to this new rule of practice in order that it may not be overlooked in future.

We find no error on the record, and the judgment of conviction will be affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

[Georgia Cotton Co. v. Lee.]

Georgia Cotton Co. v. Lee.**Assumpsit.**

(Decided May 18, 1916. 72 South. 158.)

1. **Sales; Evidence; Agency for Buyer.**—Where the action was to recover for underweight in cotton, and for billing at lower than true grade, the testimony of the party who acted for plaintiff in the sale, relative to the conversation leading up to the sale and its consummation by delivery, tending to show that the cotton was purchased by defendant and not by the party acting for defendant, was admissible.

2. **Evidence; Secondary; Collateral Matter.**—Where the suit was for the difference in the price of cotton billed out at under weight, and at lower than true grade, the draft on the defendant given for the price of the cotton by the party who was acting as agent for defendant was collateral to the issues of under weight and under grading, and its production in evidence was not necessary.

3. **Witnesses; Examination and Cross.**—The refusal of the court to permit defendant to cross examine the party who acted for plaintiff as to whether in discussing the matter with the party who bought for defendant, when the sale was over, plaintiff's agent told defendant's agent that the price he received was \$1,800 more than he expected, was proper, since such testimony was not relevant.

4. **Sales; Seller; Evidence.**—Evidence as to whether the party who bought for defendant had an account in the bank of the party who sold for plaintiff, for the purchase of cotton, was immaterial and properly excluded.

5. **Same.**—It is proper to permit testimony that certain of the cotton was delivered for the seller from the warehouse of the witness; that defendant's weigher called back or under weighed the cotton two or three pounds to the bale; and that witness thereafter re-weighed two of the bales and found that one had gained four pounds and the other six pounds.

6. **Trial; Reception of Evidence; Showing Grounds.**—Before a party can put the trial court in error for refusing to permit questions to be answered by a witness, he must inform the court what pertinent matter the answer will elicit.

7. **Witnesses; Impeachment.**—It is not permissible to ask one witness if another witness is not mistaken in his statement as to the use of certain language.

8. **Evidence; Expert.**—Where a witness testified that he received and graded the cotton for defendant, and that cotton standing as did the cotton in question would lose as indicated, plaintiff was properly permitted to cross examine such witness, and ask as to his experience as to such losses of cotton in the time he had been engaged in the business, since one who has been engaged in the cotton business for 25 or 30 years may tell of general depreciation in weight as a matter of fact.

9. **Pleading; Amendment.**—Unless injustice will thereby result to the other party, the right of amendment during the progress of the trial is authorized by § 5367, Code 1907.

[Georgia Cotton Co. v. Lee.]

10. **Charge of Court; Directing Verdict.**—Where there was evidence to support more than one count of the complaint, it was proper to refuse a charge to the effect that if the jury believe the evidence they must find for defendant.

11. **Same; Abstract.**—Where the evidence showed that the cotton was graded by defendant, and by plaintiff's agent, but not by plaintiff in person, a charge to the effect that before plaintiff could recover he must show that in grading the cotton, the agents of defendant undergraded it, and graded it below the grade that it actually showed, and that at the time plaintiff protested and objected, stating that the grades were incorrect, was properly refused.

12. **Appeal and Error; Insistence Upon.**—Assignments of error not insisted upon in brief or oral argument are considered as waived, and will not be treated on appeal.

13. **Sale; Jury Question.**—Under the evidence in this case the issue of fact as to the number of bales plaintiff had of the respective grades, was a question for the jury.

14. **Same; Instruction.**—Under the evidence in this case, it was not error to give at plaintiff's request a charge asserting that if plaintiff sold the cotton to defendant, and the grades were agreed upon, and defendant did not pay plaintiff the price agreed upon, based upon the grades agreed upon, the jury must find for plaintiff for the difference between the price, based upon the grade agreed upon, and the grade shown to have been the grades upon which payment was made.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Assumpsit by R. M. Lee against the Georgia Cotton Company.
Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from Court of Appeals.

The assignments of error relative to evidence sufficiently appear. After the trial was entered upon plaintiff offered an amendment to the complaint, which defendant moved be stricken from the file, which motion was overruled. The following charge was refused the defendant.

(13) The court charges the jury that, before plaintiff can recover on the third count of the complaint, plaintiff must show by the evidence in this case that in grading said cotton the agents, servants, or employees of defendant who had charge of the grading of the cotton for the defendant undergraded it, and graded said cotton below the grade that it actually showed, and that at the time plaintiff protested and objected to said grades, stating that they were incorrect, that they were unfair, and far below the actual grades of said cotton.

The following is charge 1 given for plaintiff:

[Georgia Cotton Co. v. Lee.]

The court charges the jury that, if they believe from the evidence that plaintiff sold the cotton to defendant, and further believe from the evidence that the grades were agreed upon and further believe from the evidence that defendant did not pay plaintiff the price agreed upon, based upon the grades agreed upon, then they must find for plaintiff for the difference between the price of cotton agreed upon, based upon the grades agreed upon, and the grades shown to have been grades upon which the payment was made.

E. H. HILL and E. S. THIGPEN, for appellant. LEE & TOMPKINS and ESPEY & FARMER, for appellee.

THOMAS, J.—The plaintiff sought recovery on a sale of 430 bales of cotton for its underweight and its billing at a lower grade than its true grade. These issues were presented by appropriate counts, to which the general issue was pleaded by the defendant.

(1) Assignments of error numbered 1 to 6, inclusive, challenge the right of witness Foy, who acted for plaintiff in making the sale, to give the conversations leading up to the sale and its consummation by delivery. Foy had testified that he had personal knowledge of the transaction, and was acting for plaintiff; that he held the cotton receipts, and sold to defendant company. It was competent for the witness to testify to the conversations with defendant and its agent in making the sale and delivery of the cotton and in receiving payment of the purchase price therefor. The testimony tended to show that the cotton was bought by the defendant, and not by Doughtie, and that Doughtie was acting as defendant's agent in making the purchase.

(2) The draft on defendant for the purchase price was collateral to the issues—of underweight and undergrading—and its production was not necessary.—*Shepherd v. Sartain*, 185 Ala. 439, 64 South. 57; *Phillips v. Pippin*, 4 Ala. App. 426, 58 South. 111; *Fowler, et al. v. Pritchard, et al.*, 148 Ala. 261, 41 South. 667; *Griffin v. State*, 129 Ala. 93, 29 South. 783; *First Nat. Bank v. Lippman*, 129 Ala. 617, 30 South. 19; *Allen v. State*, 79 Ala. 34; *Foxworth v. Brown*, 120 Ala. 59, 24 South. 1; *East v. Pace*, 57 Ala. 524; *Duffie v. Phillips*, 31 Ala. 571; 1 Greenl. Ev., § 89.

(3) The right of defendant, on the cross-examination of Foy, to ask the question, "In discussing the matter with Mr. Doughtie, after the sale was over, didn't you tell him that you had gotten

[Georgia Cotton Co. v. Lee.]

\$1,800 more for that cotton than you thought you would?" was denied by the court, which ruling is challenged in the seventh and fourteenth assignments of error. The testimony was not relevant. What Foy thought about the aggregate purchase price of the lot of 429 or 430 bales of cotton held by him as collateral did not tend to prove or disprove the issue being tried. What he thought and what he said to Doughtie did not tend to explain his direct testimony of the facts of the sale to defendant. It was not shown that before and at the time of the sale witness knew the actual weight or grades of cotton, and, in fact, he was uncertain whether the lot embraced 429 or 430 bales.

(4) The question whether Doughtie had an account in witness' bank in 1912 for the purchase of some cotton was likewise immaterial.

(5) The court properly allowed the witness Moneyham to tell that certain of the cotton was delivered for Lee from witness' warehouse, and that the weigher for the defendant "called back" or underweighed the cotton two or three pounds to the bale, and that witness thereafter reweighed two of the bales, and found that one bale gained four, and the other six pounds. This evidence tended to support one phase of the complaint. The conditions of the two bales of cotton had not changed; and it was not an experiment to illustrate a tendency of the evidence, but was the statement of a fact that at least tended to show that two bales of the cotton in question had been underweighed a total of ten pounds, and was also corroborative in effect.

The case of *Ala. Great So. R. R. Co. v. Burgess*, 114 Ala. 587, 22 South. 169, cited by appellee, does not apply to the question raised by this ruling on evidence.

(6) No custom had been proven to prevail in the section where this sale was made, nor was it proven that the sale was made with reference to any custom, to underweigh cotton.—*Crandall-Petree Co. v. Jebeles & Colias Confec. Co.*, 195 Ala. 152, 69 South. 964. Before the defendant could put the court in error for refusing to permit the questions to be answered it should have informed the court what pertinent matter the answers would have elicited.—*B. R., L. & P. Co. v. Barrett*, 179 Ala. 274, 60 South. 262.

We have examined the other assignments, and find that the trial court committed no reversible error in these rulings on the evidence, so presented for review.

[Georgia Cotton Co. v. Lee.]

(7, 8) While it is not permissible to ask a witness if another witness was not mistaken in his statement of certain language used (*Johnson v. State*, 94 Ala. 40, 10 South. 667; *Braham v. State*, 143 Ala. 28, 38 South. 919; *Newberry v. Atkinson*, 184 Ala. 567, 64 South. 46), yet the case now presented by the exception to the several questions propounded to witness Moss is different. The witness had testified that he received and graded the cotton for defendant, and that cotton standing as this cotton had stood would lose, as indicated. The plaintiff was allowed to cross-examine the witness, and asked for his experience as to cotton losses in the time indicated. One having been engaged in the cotton business for twenty-five or thirty years may tell of general depreciation in weight as a matter of fact. We do not think there was any reversible error in permitting the cross-examination of the witness Mott and Atkinson.

(9) The right of amendment during the progress of the case, unless an injustice will thereby be done the opposite party, is declared in section 5367 of the Code of 1907.—*Hanchey v. Brunson*, 181 Ala. 453, 61 South. 258; *Roden v. Capehart*, 195 Ala. 29, 70 South. 756.

(10) The general charge requested by defendant was properly refused. There was evidence to support more than one count of the complaint, and the charge requested was not as to any specific counts of the complaint, being, in effect, merely that, if the jury believed the evidence in the case, they must find for the defendant.

(11) Charge No. 13 was properly refused, under the issues in the case. The evidence shows that the cotton was graded by the defendant and the agents of plaintiff, and not by the plaintiff in person. The conduct of plaintiff is pleaded in estoppel of his right to maintain his suit for the undergrading of his cotton.

(12) There are 36 assignments of error. Some of them have been treated as waived, or were not elaborated and insisted upon in brief.—*Wes. Ry. of Ala. v. Russell, Adm'r*, 144 Ala. 142, 39 South. 311, 113 Am. St. Rep. 24; *Ward v. Hood*, 124 Ala. 570, 27 South. 245, 82 Am. St. Rep. 205; *Scarborough v. Borders*, 115 Ala. 436, 22 South. 180; *L. & N. R. R. Co. v. Morgan, Adm'r*, 114 Ala. 449, 22 South. 20; *Sylacauga Land Co. v. Hendrix*, 103 Ala. 259, 15 South. 594; *Williams v. Spragins*, 102 Ala. 424, 15 South. 247; *Rowland v. Plummer*, 50 Ala. 197.

[Robinson v. Maryland Coal & Coke Co.]

In *Johnson v. State*, 152 Ala. 93, 96, 44 South. 671, this court said: "No argument is presented nor authority cited in support of the assignment of error. Mere recital of what is shown by the record cannot be considered as an insistence on the assignment."

In *Republic I. & S. Co. v. Quinton*, 194 Ala. 126, 69 South. 604, 607, the court said: "The only allusion to this charge in the brief of counsel for appellant is: 'It is submitted that this charge was proper under the plea alleging contributory negligence, and should have been given.' This does not 'reach the dignity of an insistence upon the grounds of error covering it' (*W. U. T. Co. v. Benson*, 159 Ala. 254, 264, 273, 48 South. 712), and hence this assignment must be disregarded."

We will therefore not consider the twenty-sixth, twenty-eighth, twenty-ninth, thirtieth, and thirty-second assignments of error. We may say, however, that we have examined the charges refused and given, and find that the jury were properly instructed by the court.

(13, 14) There was no error in the giving of plaintiff's requested charge No. 1. The testimony of Lee, in explanation of the invoice on which payment was made, and of the number of bales he had of the respective grades, was in conflict with the terms of the invoice and with the testimony of the witness Dough-tie; and that issue of fact was correctly submitted to the jury on the question of "undergrading" the lot of cotton.

Finding no reversible error, the case is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

Robinson v. Maryland Coal & Coke Co.

Injury to Miner.

(Decided February 3, 1916. Rehearing denied June 1, 1916.
72 South. 161.)

1. Master and Servant; Injury to Servant; Safe Place; Escape Way.—A drift entry of a coal mine used as a place for the track, and as a passage way for the miners in going in and out of mines, and in getting from one room to another, being the only escape way from the mine, was an escape way within the meaning of rule 11, Acts 1911, p. 535, as providing for the protection of conductors of electricity in shafts and slopes used as traveled ways and in escape ways.

[Robinson v. Maryland Coal & Coke Co.]

2. Same.—Where a track divided the entry into a coal mine, making the open space to the left of the track the passage or escape way, while the part to the right of the track over which the trolley wire ran, was not used or intended to be used as a part of the passage or escape way, rule 11, Acts 1911, p. 535, was without application to the trolley wire.

3. Same; Scope of Employment; Place of Work.—At common law, the operator of a coal mine was not liable to its servant who was killed when he had departed from the place provided for him, and had gone to a place where he had no right to be.

4. Same; Jury Question.—Where the evidence was conflicting as to whether or not the trolley wire was located in a passage or escape way, it was a question for the jury whether the mine operator should have protected the trolley wire as required by rule 11, Acts 1911, p. 535.

5. Same; Invited Licensee; Jury Question.—The question as to whether decedent was an invited licensee at the point where he was killed, was for the jury where the evidence was conflicting as to whether the trolley wire which shocked and killed him was located in part of a passage or escape way.

6. Same; Safe Place.—Regardless of the statute, it was the duty of a mine operator, under the common law to exercise reasonable care to see that the places which its servants were invited to use as a passage or escape way, were reasonably safe.

7. Same.—Where an entire entry to a coal mine was used as a passage way or escape way, and the part to the left of the track was not so used exclusively, it was the duty of the company operating the mine under rule 11, Acts 1911, p. 535, to protect the trolley wire running on the ride side of the entry.

8. Same.—Under such circumstances the mine operator was liable at common law for a negligent failure to keep the passage way reasonably safe for a miner who was invited to use it as a passage way, whether he was actually engaged in his duties or not at the time he was killed by an electric shock from the trolley wire located therein.

9. Negligence; Licensee; Invitee.—A licensee upon the premises of another by invitation, injured at some point where he was neither invited nor expected to be was a bare licensee, and not entitled to protection as an invitee.

10. Same; Warning.—Under the evidence in this case, it was a question for the jury whether the decedent was warned of the danger from a dropping or hanging wire at the particular point where he was killed; so also it was a question for the jury whether deceased wore a light when killed.

11. Same; Plea.—A plea that at the time he was killed decedent had been visiting about the mine in violation of the company's rules, and was returning to his place of work and came to his death while violating the rule of which he had notice, was not so framed as to authorize the general affirmative charge for defendant.

12. Mines and Minerals; Rules; Notice.—Section 37, Acts 1911, p. 514, making a service of a copy of the rule upon a miner conclusive of his acceptance of the contents of the rule, whether he knew them or not, applies only to employees, and cannot be extended to invited licensees, since that class has no contractual relation with the operator of the mine.

[Robinson v. Maryland Coal & Coke Co.]

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Action by Mary Robinson, as administratrix, against the Maryland Coal & Coke Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The first and second counts are under the first subdivision of the Employers' Liability Act (Code 1907, § 3910), and allege the defect to be in the trolley wire in that the supports which held the trolley wire in place were broken. The third count alleges a general defect in the ways, works, machinery, etc. The fourth count was based upon the failure negligently to exercise reasonable care to furnish plaintiff's intestate with a reasonable safe place in which to work, and the fifth count is like unto the fourth count, except that it alleges the negligent failure to furnish plaintiff's intestate with a reasonably safe ingress and egress to and from his working place in the mine. The sixth count is based upon the negligent superintendence in that the trolley wire was negligently permitted or allowed to sag and become loose. The seventh count alleges employment under R. G. Bailey that intestate was rightfully upon the premises at the invitation of defendant and engaged in and about the business of defendant, although not in the employment of defendant, and that defendant negligently caused or allowed the trolley wire to be placed or hung so low as to be in a dangerous and unsafe condition, and so as to strike or come in contact with plaintiff's intestate while he was engaged in the performance of his said duties. The eighth count is like the seventh, except that it alleges the wire was charged with electricity, and was negligently allowed to be and remain unshielded and unguarded so that persons coming in contact therewith in said mine would be shocked and injured by the electricity, with which said trolley wire was charged. Count 9 is the same as 7, except that it alleges that defendant negligently caused or allowed said trolley wire to be so highly and dangerously charged with electricity as to shock or kill plaintiff's intestate. Count 10, after alleging the facts as formerly alleged, alleges that in said mine where said intestate was so invited to be, the defendant maintained a trolley wire which was charged with electricity, which said wire was used by defendant in his said mining business, and that it became and was the duty of defendant to use ordinary care to keep and maintain said trolley wire in a reasonably safe position and condition so as not

[Robinson v. Maryland Coal & Coke Co.]

to kill or injure persons invited by defendant to be in said mine. Plaintiff avers that while her said intestate was in said mine at the place where he had been invited to be as aforesaid on, to-wit, the 26th day of August, 1914, intestate was struck by or came in contact with said trolley wire, whereby he was killed. Plaintiff avers that the death of said intestate was the proximate result of the negligence of defendant in that defendant negligently maintained said trolley wire in a position where same was liable to strike or come in contact with persons in said mine, without having said wire sufficiently shielded or protected, to keep the same from shocking and injuring the persons coming in contact therewith.

The defenses were contributory negligence and certain rules or regulations governing the conduct of the mine; rule 23 as set up in plea 16 being:

"It shall be a violation of the rules of this company for an employee to go visiting about the mines. This applies particularly to miners leaving their place of work and going to the places of other miners."

And defendant says that intestate at the time of his death had been visiting about the mine in violation of said rule, and was then returning to his place of work, and that intestate came to his death while violating said rule.

BONDURANT & SMITH, and LACY & LACY, for appellant. DAVIS & FITE, and BANKHEAD & BANKHEAD, for appellee.

ANDERSON, C. J.—(1-9) The plaintiff's intestate was killed in what was termed "a drift entry" of defendant's mine, which, while used as a place for its car track, was also used as a passageway for the miners in going in and out of the mine and in getting from one room to another, and was the only escape way from said mine. It was therefore such an escape way as is within the contemplation of rule 11 of Acts 1911, p. 535, which said rule is as follows: "Conductors in shafts and slopes used as traveling ways and in escape ways shall be protected."

The evident purpose of this rule is to protect miners from coming in contact with dangerously charged electric conductors in passageways, whether in a slope or shaft, or in any escape way. So the real test in the case at bar must depend on what may be termed the place at which the wire in question was lo-

[Robinson v. Maryland Coal & Coke Co.]

cated. According to all of the defendant's evidence, and some of the plaintiff's, the wire was located on the right-hand side of the entry, being the gob side, and to the right of defendant's car track and which said track was nearer said gob side, leaving a passageway to the left of said track between it and the miners' rooms. In other words, the track divided the entry, making that portion of same to the left of the track the passage or escape way, while that part to the right of the track was not used or intended to be used as a part of the passage or escape way. If this was true, the rule above quoted did not apply to the wire in question, nor was the defendant liable under the common law to the intestate, who had departed from the place where he had been invited to be and gone across the track to a point where he had no right to be. On the other hand, there was evidence by some of the plaintiff's witnesses from which the jury could infer that the wire was located in a part of the passage or escape way, and it was therefore a question for the jury as to whether or not the defendant should have protected the wire as required by the statute, and also as to whether or not the intestate was an invited licensee at the point where he was killed, and if he was, it was the defendant's duty, under the common law and regardless of the statute, to exercise reasonable care to see that the place where the said intestate was invited to be was reasonably safe. The weight of the evidence showed that the passage, or escape way, was to the left of the track, and that the intestate was killed where he was not invited to be and where he had no right to be, and where he was not in the discharge of any of the duties of his employment. But there was evidence tending to show that the track was so laid, especially when cars were on it, that the miners could not reasonably pass along the left side, but had to cross over the track and proceed along the right side, and that instead of the track being the line of demarcation, the entire entry was used as a passage or escape way. If this was true, the wire should have been protected, under the statute, and the defendant was also liable under the common law for a negligent failure to keep the entry reasonably safe for the intestate, who was invited to use the said passageway, whether he was at the time of his death actually engaged in the duties of his employment or not, as he had a right to rely upon the safety of the only passageway furnished him for use.—*Ala. S. & W. Co. v. Clements*, 146 Ala. 259, 40 South. 971; *Dallas Mfg. Co. v. Townes*, 148 Ala. 146, 41

[Robinson v. Maryland Coal & Coke Co.]

South. 988; *Tenn. Co. v. Borgess*, 158 Ala. 519, 47 South. 1029. We are, of course, not unmindful of the fact that if a licensee is upon the premises of another by invitation, but is injured at some point where he was neither invited nor expected to be, he is a bare licensee and not entitled to the protection of an invitee; and the cases of *Pioneer Co. v. Talley*, 152 Ala. 162, 43 South. 800, 12 L. R. A. (U. S.) 861; *Geis v. Tenn. Co.*, 143 Ala. 303, 39 South. 301, and *Walker v. So. Ry. Co.*, 169 Ala. 359, 53 South. 994, are in thorough accord with the present holding and are not in conflict with the authorities *supra*. The *Pioneer Case*, *supra*, was by a servant against the master, and the action proceeded upon the theory that the plaintiff was an employee of the defendant and was injured while engaged in and about the business of the master, and the proof showed that he left the place of employment and had gone into another entry about his private business. Of course, if he left his own working place and was looking after his private business, he was not in and about the master's business when injured. We do not think, however, that this case precludes this plaintiff from recovering if the intestate was rightfully at the point where he was killed, notwithstanding he was visiting a miner to borrow a tool, for he had to pass through this particular entry in order to get there. We do not think the fact that he went to another room along the entry, which he had to pass through for any purpose, was fatal to a recovery under count 10, as he had a right to be in said entry, unless, of course, the jury believed that the right-hand side, where the wire hung, was no part of the escape or passage way. The case of *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, quoted from in the *Pioneer Case*, *supra*, specifically brings out the point that the intestate was on a visit about his own private affairs and was injured "outside the part of the mine in which he was engaged." Indeed, the United States Court of Appeals in this case held that the plaintiff could not recover upon the averment that the intestate was engaged in his duties of employment when killed, but Judge Day, speaking for the court, practically said that there could or should be a recovery upon the theory that the intestate was an invitee in the entry, and whether actually engaged in the discharge of his duty or not, at the time he was killed. If this intestate was killed in the passageway given him it matters not, under count 10, whether he was actually engaged in Bailey's work at the time of his death

[Robinson v. Maryland Coal & Coke Co.]

or not, and the question again is: Was the wire in the escape or passage way, or was it in a separate and distinct part of the entry which formed no part of an adequate passageway?

In the case of *Geis v. Tenn. Co.*, *supra*, the plaintiff, an employee, voluntarily abandoned the way the master had provided when he could have avoided the obstruction by merely going around the cars within the lighted zone.

The case of *Walker v. So. R. R.*, *supra*, was an action by an employee, and the complaint charged that plaintiff was engaged in the master's business at the time he was injured, and the court held that he was not so engaged, and that there was a fatal variance. Count 10 in the case at bar is by an invitee, and charges that intestate was killed where he had a right to be, and whether he was or was not properly on the gob side of the entry was a question for the jury upon the idea heretofore advanced in this opinion, and we think that the trial court erred in giving the general charge in favor of the defendant as to count 10. Whether or not there was such material variance between the allegations in count 8, that the intestate was in the discharge of his duties of employment when killed, and the proof, as to justify the general charge as to this count, we need not determine, as this case must be reversed for other reasons, and the plaintiff can well abandon this said count 8 upon the next trial as he can get the full benefit of same under count 10. The trial court erred in giving the general charge as to count 10. The trial court also erred in giving, for the defendant, charge 15, as it was a question for the jury, for reasons above advanced, as to whether or not the defendant should have shielded the wire at the point where the intestate was killed. There was also error in giving charge 16 for the defendant, as applicable to count 10.

(10-11) We do not think that the giving of the general charge as to count 10 can be justified upon the idea that the intestate was, as matter of law, guilty of contributory negligence. Indeed, the trial court evidently did not take this view of the case, or the general charge would have also been given as to counts 7 and 9. In the first place, it was for the jury as to whether or not the intestate was warned as to the danger at the particular point; that is, of the drooping or hanging wire. Bailey claims to have not only warned him to keep a lookout for wires, but at this specific point, and of the danger, but he claims to have done this upon a day previous to his death, as he said he did not see him

[Robinson v. Maryland Coal & Coke Co.]

the day of his death until he was dead. Yet, there was other evidence from which the jury could infer that the intestate never worked in the mine prior to the day of his death. The witness Blankenship testified to warning the intestate, in a general way, to look out for wires, but admitted upon cross-examination that he "did not say anything to him about any part hanging down" as he "thought he could see it." Again it was a question for the jury as to whether or not the intestate was going without a light when he came in contact with the wire. The last seen of him, just before he was killed, he had a lighted lamp on his cap and which was very near a point where he was found dead. It is true that an auger and lamp were found on a car near the body of deceased, but the proof did not show conclusively that it was his lamp. It was cold, and if it had been his it might have been warm, as intestate's lamp was lighted when he was last seen and which could not have been long before his dead body was found, and the lamp was found on the car. Nor was the plea invoking the defendant's rule 23 framed so as to authorize the general charge for the defendant. Plea 16, as last amended, advances rule 23 as a defense and avers that the intestate had notice of same. Blankenship says that the safety man gave the intestate a book of rules the day he was killed, that he "saw it in his possession;" but there is no proof that he was told what it was or that he could or did read the book, or that he had time to do so before getting killed.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

UPON REHEARING.

ANDERSON, C. J.—(12) It is now suggested that section 37 of Acts 1911, p. 514, makes the service of a copy of the rule upon the employee conclusive of his acceptance of the contents thereof whether he knew of the same or not. It is sufficient to say, in response to this contention, that count 10 proceeds upon the theory that the plaintiff was an invited licensee, and not an employee, and section 37 applies to employees, and cannot be extended to a class who had no contractual relation with the operator of the mine.

[Birmingham, Ensley & Bessemer R. R. Co. v. Stagg.]

Birmingham, Ensley & Bessemer R. R. Co. v. Stagg.

Personal Injury.

(Decided May 18, 1916. 72 South. 164.)

1. **Street Railroads; Use of Street; Nuisance.**—A street railroad is not per se a public or private nuisance so long as its use of the street does not necessarily interfere with ordinary travel, and is not a substantial impairment of the private rights of property.

2. **Municipal Corporation; Private Use of Highway.**—Public highways belong to the public from side to side and from end to end, and one using a public highway for his own private use commits an indictable offense, notwithstanding it may be so used with the permission of the municipal authority.

3. **Street Railways; Light in Street; Construction of Track.**—A street railroad using a public street must lay and maintain its track so as to cause as little injury or inconvenience to the public as possible.

4. **Same; Jury Question.**—Whether in a given case the rails of a street car track are so laid or maintained as to constitute negligence, is usually a question for the jury, depending upon particular circumstances, though there may be cases when the court may determine it as a matter of law.

5. **Same; Construction of Track; Due Care.**—Independently of statutes and ordinances, street railways are bound to construct and maintain their roads, rails, etc., so that the use of the street by the public shall not be materially impaired or made dangerous; at least so far as is practicable and consistent with the use of the street.

6. **Same; Injuries on Track; Negligence.**—A street railroad is liable to an individual for injuries proximately resulting from its obstruction of the streets, or for other negligence chargeable to it, which it should or could have avoided by the exercise of reasonable care.

7. **Same; Pleading.**—Allegations that defendant maintained a street railroad, that plaintiff while riding a motorcycle collided with the rail, and was thrown to the ground and injured as a proximate result of the negligence of defendant in permitting the rail to stand above the level of the street, sufficiency show a duty owing by defendant to plaintiff, the breach thereof and injury to plaintiff as a proximate result.

8. **Negligence; Pleading; Sufficiency.**—While very general averments of negligence are sufficient in pleadings, yet such averments should show a causal connection between the negligence and the injury suffered; generally, it is sufficient to aver the facts out of which the duty springs, and the negligent failure to perform such duty, but it is not necessary to define the quo modo, or to specify the particular acts of diligence that should have been employed in the performance of such duty.

9. **Street Railways; Injury on Track; Ordinances.**—Where plaintiff's motorcycle struck a street car rail projecting above the grade of the street, and plaintiff was thrown and injured, counts declaring on negligence in the vio-

[Birmingham, Ensley & Bessemer R. R. Co. v. Stagg.]

lation of ordinances as to the maintaining of street car tracks, the ordinances were admissible, notwithstanding defendant put in evidence his franchise, such franchise not repealing the ordinances, but requiring obedience thereto.

APPEAL from Birmingham City Court.

Heard before Hon. JOHN C. PUGH.

Action by Oscar M. Stagg against the Birmingham, Ensley & Bessemer Railroad Company, for damages for injuries alleged to have been sustained from the negligent construction of its tracks in the street. From a judgment overruling demurrers to the complaint defendant appeals. Affirmed.

Transferred from Court of Appeals.

FORNEY JOHNSTON, and W. R. C. COCKE, for appellant. BEDDOW & OBERDORFER and LOUIS BERKOWITZ, for appellee.

MAYFIELD, J.—The action is to recover damages for personal injuries received in consequence of plaintiff's being thrown from a motorcycle which he was riding along one of the public streets in the city of Birmingham.

The allegation and claim of plaintiff is that he was thrown or caused to fall on account of his motorcycle's coming in contact with one of the defendant's rails laid along or across the street and protruding high above the grade of the street, and so forming an unlawful obstruction of the public highway; and in some of the counts the rail is alleged to have constituted a nuisance, in that it was an obstruction of the highway.

Demurrers were interposed to the counts, on the grounds that no breach of duty owing by defendant to plaintiff was shown, and that the facts alleged did not show the rail in question to have been either an unlawful obstruction of the highway or a nuisance. The demurrers were overruled, and the correctness of this ruling is one of the assigned errors most insisted upon by appellant.

(1, 2) The following principles of law are well settled in this state: "A street railway or street car line upon the streets and highways is not per se a public or a private nuisance, nor a new servitude imposed upon the land, for which the owners of a fee are entitled to compensation, and there is no limit to the use of public streets for the purpose of travel, so long as the use does not unnecessarily interfere with ordinary travel, and is not a substantial impairment of the private rights of property.—*Morris v.*

[Birmingham, Ensley & Bessemer R. R. Co. v. Stagg.]

Montgomery Co., 143 Ala. 246, 38 South. 834."—6 Mayf. Dig. 848.

"Public highways belong to the public from side to side and from end to end. There is no such thing as the rightful, private, permanent use of a public highway, and any person who uses a public highway for his own private use commits an indictable public offense, notwithstanding it may be so used with the permission of the municipal authorities.—*First Nat. Bank of Montg. v. Tyson*, 144 Ala. 457, 39 South. 560."—6 Mayf. Dig. 850.

While this court has made a distinction between the rights and duties of the public where the travel is along or over the track of a street railroad laid at grade on a public highway and where the travel is along or over a track not so laid (*Jones' Case*, 153 Ala. 157, 45 South. 177), and has declared different rules of pleading between cases where the injured plaintiff was a trespasser on the track and cases where he was not a trespasser, but was on the track by right, as at a public crossing or traveling along a street on which the track was laid at grade, yet this doctrine finds no room for operation on a demurrer to the complaint in this case; the negligence attempted to be alleged being the obstruction of a public street, and not interference with plaintiff's right to use the street or to cross the track. In other words, there is nothing in this complaint to show, even by inference, that plaintiff was a trespasser, or was wrongfully crossing defendant's track.

(3, 4) A street car company having its rails in or across a public street used as a highway by the public must lay and maintain the rails in such position as to cause as little injury or inconvenience to the public as possible. It is usually required by statutes or ordinances, one or both, that street railways laid along public streets shall be laid and kept at the same grade and level as the street, or as nearly so as practicable. Whether in a given case the rails are so laid or kept as to constitute negligence is usually a question of fact, depending upon the particular circumstances, though there may be cases where the court might say as a question of law whether or not there was negligence per se in this particular, and especially if the rails were laid or kept in violation or without authority of a statute or ordinance to that end. But no such case is presented by this record.—*Nellis on Street Railways*, § 125; *Groves v. L. R. R. Co.*, 109 Ky. 76, 58 S. W. 508, L. R. A. 448; 23 A. & E. Enc. Law, p. 983.

[Birmingham, Ensley & Bessemer R. R. Co. v. Stagg.]

(5) While statutes and ordinances may impose rules for the construction and maintenance of street railways in public streets, and such regulations are usually thus made, yet, independently of such provisions, street railways so using the public streets are bound to so construct and maintain their roads, rails, etc., as that use of the streets by the public shall not be materially impaired or rendered dangerous. Certainly they are bound to do so so far as is practicable and consistent with their use of the streets.

(6) This duty being imposed by law, street railways are, of course, liable to individuals for injuries proximately caused by obstructions in such streets, or other negligence chargeable to such railways, which they could or should have avoided by the exercise of reasonable precaution in the premises. If defects causing injuries to individuals be the result of the street railway's negligence in either the construction or the maintenance of its road in such streets, it must answer in damages for the consequences.—Pearce on Railroads, p. 248; Booth on Street Railways, § 243; Wood on Railroads, p. 757; *St. L. & S. F. R. R. Co. v. Jamar*, 182 Ala. 554, 62 South. 701; *Montgomery St. Ry. Co. v. Smith*, 146 Ala. 316, 39 South. 757; *Bir. Co. v. Alexander*, 93 Ala. 133, 9 South. 525; 29 Cyc. 1177.

(7) It was alleged on this subject that: "The defendant maintained a street railroad over and along, to-wit, Third street, in that part of the city of Birmingham formerly known as Pratt City, and plaintiff avers that on, to-wit, said day, a motorcycle driven by the plaintiff at, to-wit, said Third street, in said part of the city of Birmingham formerly known as Pratt City, came in collision with a rail of defendant's said track on said Third street in that part of the city of Birmingham formerly known as Pratt City, and that plaintiff was precipitated from his said motorcycle to the ground, his leg was broken," etc.

"And plaintiff avers that he suffered said injuries and damages by reason of and as a proximate result of the defendant's negligently permitting said rail to stand high above the level of the street."

Some of the counts, after alleging the facts above, added that the elevation of the rails above the surface of the street was so high as to constitute a nuisance.

These counts, we think, were sufficient to show a duty owing by the defendant to the plaintiff, one of the public, and a breach of that duty and injury to the plaintiff as a proximate result of

[Birmingham, Ensley & Bessemer R. R. Co. v. Stagg.]

such breach, which is all that is required to be alleged, under our system of pleading, in negligence cases.

(8) Very general averments of negligence are sufficient in pleadings. Pleadings, however, should allege or show a causal connection between the negligence and the injury suffered, and it is held sufficient where the complaint charged negligence of the servant to show that he was acting within the line and scope of his duty.—*Amer. Bolt Co. v. Fennell*, 158 Ala. 484, 48 South. 97; 6 Mayf. Dig. 669.

When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule, it is sufficient if the complaint aver the facts out of which the duty to act springs and that the defendant negligently failed to do and perform. It is not necessary to define the quo modo or to specify the particular acts of diligence he should have employed in the performance of such duty.—*L. & N. R. R. Co. v. Church*, 155 Ala. 329, 46 South. 457, 130 Am. St. Rep. 29; *So. Ry. Co. v. Burgess*, 143 Ala. 367, 42 South. 36; 6 Mayf. Dig., 669.

It follows that there was no error in overruling the demurrer to the complaint.

(9) There was no error in allowing plaintiff to introduce sections 667-674 of the Birmingham Municipal Code. They imposed legal duties on the defendant as to the construction and maintenance of its roads in the streets of Birmingham, and the defendant's charter did not repeal them, but, to the contrary, the charter or franchise of defendant "imposed the duty to maintain the track and rails of the track in such reasonable manner as the city may direct." These sections of the city code were part of the directions of the city council; and, the defendant having introduced its franchise in evidence, the sections of the code were therefore admissible. Moreover, there were counts declaring on negligence in the violation of ordinances of the city of Birmingham as to laying and maintaining street car tracks in the streets, and surely these sections of the code were admissible under these counts.

All the errors assigned and insisted upon have been examined, but we do not deem it necessary to further notice them in this opinion. The counts declaring for a breach of the ordinances were, of course, sufficient; they alleged every fact necessary to state a good cause of action.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

[Minge v. Clark.]

Minge v. Clark.

Bill for Injunction.

(Decided May 18, 1916. 72 South. 167.)

1. **Pledge.**—Since the law affords remedies to redeem property pledged as security for the performance of a contract, a bill in equity will not lie.

2. **Mortgages; Pledges; Distinction.**—In a mortgage the legal title is vested in the mortgagee, leaving the mortgagor with only an equitable title which only a court of equity can enforce, but in the matter of a pledge, the pledgor retains the legal title to the property, and a court of law can act upon and enforce it.

3. **Pledges; Payment; Effect.**—The payment or tender of payment by the pledgor of the debt secured extinguishes the lien of the pledgee, leaving in the pledgee the naked possession exposed to the pledgor's action at law to recover it.

4. **Same; Redemption; Remedy.**—The mere failure of the plaintiff pledgor to perform a condition precedent necessary to equip him to maintain an action at law does not authorize a court of equity to interfere and relieve him of the consequences, as where a pledgor, suing in detinue for the recovery of the pledge, omitted to pay or tender to the pledgee the amount due.

5. **Same; Equity.**—The offer of the pledgor to pay the pledgee any amount which might be due on the contract did not give a bill to redeem property pledged as the security for the performance of a contract equity.

6. **Same.**—Where complainant had several adequate remedies at law upon paying or tendering the pledgee the amount due on the contract a bill to redeem the pledged property was not good as one for a specific performance.

APPEAL from Marengo Law and Equity Court.

Heard before Hon. E. J. GILDER.

Bill by John H. Minge against W. C. Clark and others. From a decree for respondents, complainant appeals. Affirmed.

The following is the decree of the law and equity court:

(1) This cause, coming on to be heard, was submitted upon respondents' motion to dissolve the injunction issued in the cause and upon respondents' demurrers to complainant's bill of complaint, was argued by counsel, and duly considered by the court. The bill shows that complainant has obtained possession of the bonds and certificates of stock, described therein, by executing as plaintiff a forthcoming bond in a detinue action in which he was cast, and now he seeks to enjoin the sheriff from returning to the defendants in said detinue action the certificates of stock,

[Minge v. Clark.]

delivered to said sheriff by him, and also the execution to the sheriff of the bonds within the time fixed by law. To that extent the bill is one to redeem property pledged as security for the performance of a contract. Unless there is some other ground in the bill giving it equity, the bill is without equity, as the law affords remedies to redeem property so pledged.

(2, 3) The distinction between a mortgage and a pledge is that in the mortgage the legal title is vested in the mortgagee, leaving the mortgagor with only an equitable title, which only a court of equity can enforce, while in the pledge the pledgor retains his legal title to the property pledged, which a court of law can act upon and enforce. Payment or tender of payment by the pledgor of the debt so secured extinguishes the lien of the pledgee, and leaves him in the naked possession of the pledgor's property, exposed to and without a defense against the pledgor's appropriate action at law.

(4) The bill shows that complainant sought the aid of a court of law to recover the property pledged, but that he omitted to pay or make a tender of the amount due on the contract, for the payment of which it was pledged to secure, which was a prerequisite to a successful termination in his favor of his action in detinue. The mere failure of a party to perform a condition precedent necessary to equip him to maintain an action at law does not authorize a court of equity to interfere and relieve such party from the consequences. If there is nothing due respondent Clark by complainant on the contract so secured by the pledge, as is alleged in the bill, the law courts have been open to complainant, offering him several adequate remedies for redress, and if there is anything due on the contract he has still had these opportunities, conditioned upon a proper tender made. Whether the results of the several actions at law growing out of these transactions have determined complainant's rights in the premises is not a question for this court in this case to decide.

(5, 6) The court does not think that the offer of complainant to pay any amount which may be due on the contract gives the bill equity; neither does the court believe that the bill shows a sufficient complication of accounts between the parties to warrant an accounting in equity; nor that the bill is good as one for specific performance, in view of complainant's several adequate remedies at law upon performance by complainant of his part of the contract. It does not seem to the court that there is any

[Minge v. Clark.]

equity in the cause of action pending in the city court of Birmingham, described in paragraph X of the bill; it being an action by respondent Clark against complainant for breach of said contract, against which action complainant has his full and adequate defenses, if the facts are correctly stated on his bill. With this view of the whole case presented by the bill the court is of the opinion that there is no equity in the bill, that said motion to dissolve the injunction should be granted, and that respondent's demurrers are well taken.

It is therefore, upon consideration, ordered, adjudged, and decreed that said injunction be, and the same is hereby, dissolved upon respondents W. C. Clark and G. O. Miller entering into bond in the sum of \$10,200, payable to, and to be approved by the register of this court, conditioned to refund the money and interest they may collect on said judgment, if the same is, on the final hearing of the bill, perpetually enjoined, and that said demurrers be, and the same are hereby, sustained. And it is further ordered that complainant be and he is hereby allowed 30 days in which to offer an amendment to his bill, if so advised. And it is further ordered, adjudged, and decreed that said injunction be reinstated pending appeal, upon complainant entering into bond in the sum of \$10,200, payable to respondents W. C. Clark and G. O. Miller, and approved by the register of this court, conditioned on the dissolution of such injunction, to pay the amount of the judgment enjoined, with interest, and also such damages and costs as may be decreed against complainant.

LONDON & FITTS, and E. E. TAYLOR, for appellant. GEORGE PEGRAM, DAVIS & FITE, and BANKHEAD & BANKHEAD, for appellee.

PER CURIAM.—We have carefully examined the questions presented by this appeal, and are of the opinion that the decree of the law and equity court should be affirmed, for the reasons therein stated.

Affirmed.

ANDERSON, C. J., and MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

[Western Union Telegraph Co. v. Miller.]

Western Union Telegraph Co. v. Miller.

Failure to Deliver Telegram.

(Decided June 1, 1916. 72 South. 168.)

1. **Telegraphs and Telephones; Limiting Liability; Persons Bound.**—Although ignorant thereof, the sender of a telegram is bound by the reasonable conditions printed on the blank, unless such ignorance is due to his honest mistake, or the company's fault.

2. **Same.**—Where the sender is the agent of the sendee of a telegram, the sendee is bound by the reasonable stipulations, although his agent had no actual knowledge of the stipulations.

3. **Same.**—The provision on a telegraph blank that the company would not deliver beyond a certain radius from its office, except as the agent of the sender, is subject to parol waiver.

4. **Same.**—If the company knowing that the address on the message was beyond its delivery radius, undertook to deliver the message upon the payment of the usual charges, it waived the provision that it would not deliver beyond a certain radius from its office.

5. **Same; Damages; Replication.**—The replication examined and held to sufficiently state the facts constituting a waiver of the company of certain provisions exempting it from liability.

6. **Same; Negligence.**—A printed provision on a telegraph blank exempting the company from liability, while delivering a message beyond its regular delivery radius, will not exempt it from liability for negligence.

7. **Same; Plea.**—The plea setting up that the sender was negligent in not furnishing the sendee's correct address, is not sufficiently met by a replication alleging that the sendee could have been located through the address given, but stating no facts showing a duty to inquire, or how the given address would help.

8. **Pleading; Construction; Inference.**—Where pleas were interposed by defendant after its demurrers to the amended complaint were overruled, they went to the amended complaint, although they did not specifically so state.

9. **Telegraphs and Telephones; Evidence; Burden of Proof.**—Where the complaint sought damages for the failure of plaintiff to attend a funeral caused by delay in the transmission of a telegram, the plaintiff has the burden of proving that he would and could have attended had the message been promptly delivered.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROW.

Action by O. T. Miller against the Western Union Telegraph Company, for failure to deliver a death message. Judgment for

[Western Union Telegraph Co. v. Miller.]

plaintiff, and defendant appeals. Transferred from Court of Appeals under Acts 1911, p. 450, § 6. Reversed and remanded.

The message was addressed to O. T. Miller at No. 1009 East Birmingham, Ala., and announced the death of the father of said Miller, and was signed by J. F. Miller. The defendant set up by way of plea that the address given thereon was 1009 East Birmingham, Ala.; that the message was a night message, was written upon blanks of defendant company, and was sent subject to the following provisions: Messages will be delivered free within one-half mile of the company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits, the company does not make deliverance, but will, without liability at the sender's request as his agent, and at his expense, endeavor to contract for him for such delivery at a reasonable price. The defendant avers that said message was transmitted promptly to said address in Birmingham, the terminal office indicated thereon, but that the address given on said message was beyond the free delivery limit of defendant's Birmingham office, and that plaintiff was not to be found within the said free delivery limit by the exercise of reasonable diligence, nor was any provision or request made by the sender or by plaintiff for the delivery beyond said free delivery limit. The third plea sets up the same state of facts, and sets out the additional terms on the back of the form as to night messages, that they will receive messages to be sent during the night for delivery not earlier than the morning of the next ensuing business day at reduced rates, and also the provisions as set out in the above plea with the allegation that addressee lived beyond the free delivery limit, and that defendant on the next business day made delivery of the message at the home address given on the message at about 8 o'clock a. m. The fourth plea sets up a negligent and erroneous address, and that plaintiff could not be found at the address given. Replications were filed as follows:

Replication 3 to defendant's second and third pleas: Plaintiff avers that the sender of said message, plaintiff's said brother J. F. Miller, had no knowledge whatever of said alleged provision, and without any such knowledge delivered said message to defendant, together with the address of plaintiff, to-wit, East Birmingham, Ala., and paid defendant in good faith the price charged by defendant; that defendant with full knowledge that

[Western Union Telegraph Co. v. Miller.]

the address given in said message was without the free delivery limit of its Birmingham office, nevertheless received such message for the immediate transmission and prompt delivery for the sum paid defendant by J. F. Miller.

Replication 4 to defendant's second and third pleas: Plaintiff's brother J. F. Miller, without any knowledge whatever of said alleged provision, delivered said message to defendant, together with plaintiff's address, to-wit, East Birmingham, Ala., and requested defendant to speedily transmit and deliver same to plaintiff at the same time in good faith paying the defendant the amount charged by it for a speedy transmission and delivery of the message, which said charge was made by defendant, with full knowledge on its part of the fact that the address given in said message was without the free delivery limit of defendant's Birmingham office.

Replication 5 to second and third pleas sets up the same state of facts as the former replications and adds that defendant's said agent knew that train No. 40, which said message requested plaintiff to take, was scheduled to leave Birmingham at 6 o'clock next morning, and knew that the address given in said message was without the free delivery limit of defendant's Birmingham office.

Replication 6 to second and third pleas sets up the same facts as replications 3 and 4, and adds that defendant, after discovery of the fact that plaintiff's address was without the free delivery limits of defendant's Birmingham office, notwithstanding said alleged provision, undertook for a reward which it expected to and did receive from the sender or his agent upon delivery of said message to deliver said message to plaintiff at said address, but negligently conducted itself in this regard, wherefore plaintiff says defendant has waived the alleged provisions.

Replication 8 to plea 4: Plaintiff avers that by the exercise of reasonable diligence with the aid of the address given, to-wit, 1009 East Birmingham, defendant could promptly have made delivery of said message.

The following charges were given for plaintiff:

(1) The court charges the jury that if plaintiff has established to the reasonable satisfaction of the jury the material averments of his complaint, and the defendant has failed to prove to the reasonable satisfaction of the jury, by a preponder-

[Western Union Telegraph Co. v. Miller.]

ance of the evidence, the material averment of at least one of the special pleas, then your verdict must be for defendant.

(2) The burden of proof is on defendant to establish to the reasonable satisfaction of the jury by a preponderance of the evidence all of the material averments of a special plea.

(3) In order for defendant to defeat recovery by reason of the alleged provision as to the delivery of messages beyond certain limits, it is not sufficient for defendant to show that such provision was on the back of a telegram blank on which the message was sent, but defendant must also prove to the reasonable satisfaction of the jury by a preponderance of the testimony in the case that said provision entered into and constituted a part of the contract of transmission and delivery of said message between the sender and the company.

(4) If plaintiff has proved to the reasonable satisfaction of the jury his complaint and also either one of his special replications to defendant's pleas, then plaintiff is entitled to a verdict.

The following charge was refused to defendant:

(6) The burden of proof rests on plaintiff to prove to your reasonable satisfaction the time and connection by which plaintiff might have reached Austell, Ga., and arrived at or near the scene of his father's funeral, before you would be authorized to assess any damages whatever in favor of plaintiff on the theory that he had been prevented from attending.

GEORGE H. FEARONS, FORNEY JOHNSTON, and W. R. C. COCKE, for appellant. BURGIN, JENKINS & BROWN, for appellee.

ANDERSON, C. J.—(1, 2) The sender of a message who writes or causes it to be written upon one of the blanks of the telegraph company, containing reasonable terms and provisions, is estopped to deny their binding force, or to plead ignorance of their contents before delivering the message for transmission, unless such ignorance is induced by honest mistake on the part of the sender, or fraud or misrepresentation on the part of the company.—*W. U. T. Co. v. Prevatt*, 149 Ala. 617, 43 South. 106; *McGehee v. W. U. T. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512; *W. U. T. Co. v. Worley*, 12 Ala. App. 494, 68 South. 558; *W. U. T. Co. v. Harwell*, 91 Ala. 340, 8 South. 649. The pleadings show that the sender was the agent of the sendee, and this being the case, the stipulation was binding on the principal.

[*Western Union Telegraph Co. v. Miller.*]

—*McGehee's Case, supra.* He was bound by said stipulations notwithstanding his agent did not read them and had no actual knowledge of the contents.—*Prevatt's Case, supra,* and cases there cited. The plaintiff's replications, or some of them, do not deny the agency or the existence of the stipulation as set up in defendant's special pleas, and of which the law charged him with notice, whether he had knowledge of same or not, and said replications seek to avoid the same upon a want of knowledge of the stipulation, although the law charged him with notice. In other words, he seeks to avoid the effect of the stipulations in the contract because his agent did not read the same or have it specially brought to his attention. Replication 2 does not set up a waiver of the stipulation, as it does not charge that defendant's agent had notice that the address was beyond the free delivery limits when making the charge for transmission, and, as above stated, the plaintiff cannot avoid the stipulation merely because his agent had no knowledge of a provision in the contract and of which the law charged him with notice. This replication is not governed by the holding in the case of *W. U. T. Co. v. Burns*, 164 Ala. 252, 51 South. 373. It is true that this replication 2 is quite similar to replication 4 in said case to plea 2, but its sufficiency seems not to have been questioned or considered upon appeal. Moreover, the court held, under the peculiar facts in that case, that it was a question of fact, and not of law, as to whether or not the defendant's agent, who transcribed the message, which was handed him upon ordinary paper, onto one of the defendant's forms, was acting as agent for the plaintiff in doing so. If he was not so acting, then the plaintiff was not bound by the stipulation in the transcribed form, unless he had knowledge of same, as distinguished from notice imputed to him by law if it was transcribed by himself or agent. The pleadings are not set out in full in the *Burns Case, supra*, but it is evident that the question of agency of the person who transcribed the message was open, or it was charged that he was the agent of the defendant instead of the plaintiff, and in this event the replication was good in avoidance of the stipulation. Here the pleadings, to which the replication attempts an issue, disclose the fact that the message was written on the defendant's form, containing the stipulation, by the plaintiff's agent.

(3-5) The provision contained upon the back of the telegram blank was for the benefit of the company, and may be waived by

[*Western Union Telegraph Co. v. Miller.*]

it, and such waiver may be in parol.—*W. U. T. Co. v. Heathcoat*, 149 Ala. 623, 43 South. 117; *Caufield v. Finnegan*, 114 Ala. 48, 21 South. 484; *Security Co. v. Riley*, 157 Ala. 553, 47 South. 735; *Gallagher v. State Mut. L. I. Co.*, 150 Ala. 543, 43 South. 833, 124 Am. St. Rep. 83. Replications 3, 4, and 5, in effect, set up a waiver of the provision by the acceptance by the defendant's agent of certain charges for the delivery of said message, he having full knowledge that the address was beyond the free delivery limit. If the defendant's agent undertook to deliver the message at the address, knowing that it was beyond the free delivery limit for a fixed charge, which was paid by the plaintiff's agent, this would constitute a waiver of the provision. It is no doubt true that the waiver relied upon should not be the mere general averment of such, or the conclusion of the pleader, but we do not think that such is the case with replications 3, 4, and 5; they set up briefly and concisely the facts constituting the waiver. It is true each of those replications, like number 2, negative knowledge of the plaintiff's agent of the provision, but this would be immaterial, if the defendant waived said provision, and this averment, when coupled with the averment of the facts constituting the waiver, was but an unnecessary undertaking on the part of the plaintiff and did not render said replications subject to the defendant's demurrer.

(6) Replication 6 sets up a new undertaking for a reward, and it is insisted that said new undertaking should be read in the light of the provision upon the back of the form relieving the defendant from any liability. It is sufficient to say that the replication charges that defendant negligently conducted itself, and as against which the provision on the blank could not exempt it.—7 Mayf. Dig. 880.

(7) Plea 4 sets up contributory negligence upon the part of the sender in not giving the plaintiff's proper address, that there was no such address as the one given, and the plaintiff could not therefore be found at the place designated. Replication 8 to this plea was insufficient, as it charges no facts placing a duty or obligation upon the defendant to have made efforts to locate the plaintiff elsewhere or how or in what manner the address given would have aided in the location of the plaintiff.

(8) We are not impressed with the suggestion of appellee's counsel that this court should not review the rulings on the special pleas and replications under the authority of *Wes. U. T. Co.*

[Western Union Telegraph Co. v. Miller.]

v. Louisell, 161 Ala. 231, 50 South. 87. The records in the two cases are not similar. In the *Louisell Case*, the pleas, replications, etc., were interposed long before the last amendment of the complaint, and it did not appear that they were refiled after the amendment, or that issue was joined as to same. Here the complaint was demurred to after amendment, and on the same day, and after overruling the demurrer to the amended complaint, the pleas were interposed, and while they did not specify the complaint as amended, they were filed after the demurrer, and the demurrer went to the complaint as amended; therefore the pleas were necessarily interposed to the complaint after it was amended. It is true that after the ruling upon the pleading and before the cause was submitted to the jury, the plaintiff withdrew count 2 and replication 7, but this did not eliminate the pleas because not reinterposed after said withdrawal of count 2, as said pleas went to the complaint and each count thereof, separately and severally.

The discussion of the replications demonstrates the immateriality of the evidence of J. F. Miller as to his knowledge of the provision upon the back of the telegram.

Charge 1, given for the plaintiff, could have well been refused for the use of the word "preponderance."—7 Mayf. Dig. p. 142. Moreover, it was calculated to mislead the jury into the belief that the defendant was required by a greater degree of proof to establish its pleas than was required by the plaintiff to establish his complaint. It required the plaintiff to establish his complaint to the reasonable satisfaction of the jury, but required the defendant to establish his pleas to the reasonable satisfaction of the jury but by a "preponderance" of the evidence. Whether or not the giving of same would be reversible error we need not determine, as the case must be reversed for other reasons. It is sufficient to say that it can be refused with safety upon the next trial.

Charge 2, given for the plaintiff, if not otherwise misleading, could have well been refused because of the use of the word "preponderance." Same as to plaintiff's given charge 3.

There was no error in giving plaintiff's charge 4.

(9) The trial court erred in refusing the defendant's requested charge 6. The complaint sought damages because of a failure to attend his father's funeral, and the burden was upon him to show that he could have reached the place in time to be at

[Hall, et al. v. First Bank of Crossville.]

said funeral had the message been properly delivered.—37 Cyc. 1731; *W. U. T. Co. v. Emerson*, 161 Ala. 221, 49 South. 820. The complaint does not claim for a failure to get the message in time to have the funeral postponed, and that it would have been postponed to await the arrival of the plaintiff, but that the plaintiff failed to get the message in time to attend the funeral, and in order to recover this element of damages, the burden was upon him to show that the delay in the delivery was the proximate cause of his not getting to the funeral. To do this he had to show that he would have gone and that he could have arrived in time for the funeral had the message been promptly delivered, and this proposition was substantially asserted in defendant's refused charge 6. It is conceded by both sides that this charge 6 is incorrectly set out in the record, as it contains the word "father" instead of mother, and the original contained the word "mother." This error in the original charge no doubt justified its refusal, but the principle announced as to same is sound.

The judgment of the circuit court is reversed.

Reversed and remanded.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

Hall, et al. v. First Bank of Crossville.

Assumpsit.

(Decided May 18, 1916. 72 South. 171.)

1. **Appeal and Error; Who May Take; Joint.**—An appeal from a judgment against two or more defendants may be taken by one alone, under Acts 1911, p. 589.

2. **Same; Assignment; Joint; Effect.**—Joint assignment of errors on a joint appeal are unavailing, unless the errors are injurious to all who join.

3. **Bills and Notes; Presentment and Dishonor; Notice to Maker.**—The maker of a note is not entitled to presentment or notice of dishonor.

4. **Same; Defenses.**—In an action on a note, one may show that he is not liable as a maker but only as an endorser.

5. **Appeal and Error; Review; Objections Below.**—If the complaint contains a substantial cause of action, no judgment rendered thereon can be annulled, arrested or set aside for any matter not previously objected to. (§ 4143, Code 1907.)

6. **Same; Exceptions.**—Under § 4145, Code 1907, on a motion to annul, vacate, or arrest a judgment, exceptions may be taken to any ruling, and a

[Hall, et al. v. First Bank of Crossville.]

bill of exception may be signed and certified as a part of the record, and an appeal taken as in any other action.

7. **Same; Default Judgment; Review.**—In the absence of a bill of exceptions, the evidence is presumed to support the judgment on an appeal from such judgment.

8. **Same.**—After motion made to annul, arrest or vacate a default judgment has been denied, on an appeal from a default judgment, no presumption need be indulged as to the correctness of the court's ruling where the record fails to show a judgment thereon.

9. **Same.**—Where the complaint states a substantial cause of action, and the judgment is responsive thereto, on an appeal from a default judgment, the appellant cannot complain of demurrable defects in the complaint, even though the defects be misjoinder of causes of action in the same count.

10. **Same.**—On a motion to annul, arrest or vacate a default judgment, the complaint will be liberally construed, and if it appears by treating all amendable defects as amended that a substantial cause of action is pleaded, the judgment will be sustained.

11. **Bills and Notes; Negotiation; Endorsement.**—Under Acts 1909, p. 154, § 184, the maker of a note is primarily liable, and will be presumed to have endorsed it to complete its negotiation to plaintiff.

12. **Appeal and Error; Review; Default Judgment.**—Where the bill of exceptions on a motion denied to annul, arrest or vacate a default judgment on a note, does not present the evidence, such evidence is no part of the record, and cannot be reviewed.

13. **Same.**—Where the evidence is not presented by a bill of exceptions, the form of the note as set forth by a copy in the transcript cannot be considered, but the form of the note must be determined by the averments of the complaint on which the default judgment is rendered.

14. **Bills and Notes; Notice of Dishonor; Averment.**—Before an endorser can be liable for the payment of a note, notice of dishonor must be averred and proven as required by the statute.

15. **Same; Amendment.**—Under § 29, Acts 1909, p. 141, where the complaint in an action on the note does not allege notice of dishonor to the endorser, an amendment may be allowed, or the action dismissed as to such endorser.

16. **Appeal and Error; Review; Vacating Judgment.**—In the absence of a bill of exceptions, on an appeal from the denial of a motion vacating a judgment, in passing on a motion to set aside and vacate a judgment, the trial court must be presumed to have had evidence before it to justify the denial of the motion.

APPEAL from DeKalb Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by the First Bank of Crossville against J. D. Hall and others on a note. Judgment for plaintiff by default, and upon motion of defendant, the court declined to set aside or annul the judgment, and defendants appeal. Affirmed.

Transferred from Court of Appeals.

[Hall, et al. v. First Bank of Crossville.]

ISELL & SCOTT, for appellant. I. M. PRESSLEY, and HUNT & WOLFES, for appellee.

THOMAS, J.—The appeal is taken upon the record from a judgment by default against appellants. The defendants moved to quash the execution issued thereon and to set aside, vacate, and annul the judgment, on the grounds that the complaint does not show a substantial cause of action, in that it claims against James A. Croley, as an indorser of the note, without alleging any demand on the maker of the note, or a waiver of demand on the part of Croley; and that the record shows that the judgment obtained was of more binding effect than was sought in the complaint.

A joint appeal was taken by J. D. Hall and James A. Croley, as evidenced by the recitals of an appeal bond (though signed only by J. D. Hall), that "on the 4th day of September, 1915, First Bank of Crossville recovered a judgment against J. D. Hall and Jas. A. Croley upon a motion to quash and vacate execution a judgment for the sum of \$245 obtained by said First Bank of Crossville and costs of suit, in the circuit court of said county, from which judgment J. D. Hall and Jas. A. Croley have obtained an appeal returnable to the next term of Court of Appeals of Alabama. Now, therefore, if the said J. D. Hall and James A. Croley shall prosecute said appeal to effect, etc.," and by the terms of the notice of appeal to appellee, to the effect that "a judgment was rendered against J. D. Hall and James A. Croley, in favor of the First Bank of Crossville, a corporation in a case wherein the First Bank of Crossville, a corporation, plaintiff, and J. D. Hall, M. D., and James A. Croley, defendants, in the circuit court of said county, on the 18th day of February, 1915, and from such judgment J. D. Hall and James A. Croley, defendants, have obtained an appeal to the Court of Appeals of Alabama." The certificate of appeal was to like effect as the notice of appeal.

Though the appeal bond recites that the appeal is taken from the judgment on the motion to quash the execution and to set aside and annul a judgment, and that the judgment so appealed from was of date September 4, 1915, no such judgment on the motion is contained in the record. It has been held that a docket memorandum of the ruling of the presiding judge is not sufficient to show the judgment of the court, if no formal judg-

[Hall, et al. v. First Bank of Crossville.]

ment was entered thereon; that the docket memorandum is merely a direction to the clerk as to how the judgment or decree of the court shall be enrolled or entered.—*McLaughlin v. Beyer*, 181 Ala. 427, 61 South. 62; *McSwean v. State*, 175 Ala. 21, 57 South. 732; *Wynn, et al. v. McCraney, et al.*, 156 Ala. 630, 46 South. 854; *Morgan v. Flexner, et al.*, 105 Ala. 356, 16 South. 716. The notice of appeal and the certificate of appeal showed appeal from the judgment rendered on the 18th day of February, 1915, and not from the judgment on the motion to quash, set aside, and annul the judgment described by the bond to have been entered on September 4, 1915.

(1, 2) From whatever judgment or ruling of the court the appeal was taken, it is clear that the appeal was taken jointly by J. D. Hall and James A. Croley. The appeal could have been prosecuted by either party against whom the judgment was rendered alone.—Acts 1911, p. 589. The appeal and the assignment of errors being joint, such assignment is not availing, unless injurious to all who join therein.—*Gilley, et al. v. Denman*, 185 Ala. 561, 64 South. 97; *Fletcher, et al. v. Riley*, 169 Ala. 433, 53 South. 816; *Beachman v. Aurora Silver Plate Mfg. Co.*, 110 Ala. 555, 18 South. 314.

(3, 4) The judgment by default of February 18, 1915, was taken against J. D. Hall and James A. Croley jointly; and, if the joint assignment of error cannot be sustained as to J. D. Hall, it is not available to James A. Croley. The averments of the complaint were: "The plaintiff claims of the defendant \$200 due on a certain promissory note made by him on the 11th day of November, 1913, and due and payable on the 15th day of April, 1914;" that the note was made payable "to the order of the defendant, J. D. Hall, M. D., with interest thereon from date;" and that "the said J. D. Hall, M. D., and James A. Croley, the defendants herein, placed their signatures upon the back of said note as indorsers, before the delivery" to the plaintiff bank. It is thus averred that one of the defendants was the maker of the note, which being true, such defendant, being primarily liable, was not entitled to presentment for payment nor to notice of dishonor. If, however, Croley or Hall, or both of them, whose names were placed on the back of the note as indorsers before its delivery to the bank, was or were the maker or makers, or the party or parties securing the accommodation from the bank, they or he would be primarily liable to the bank for the payment

[Hall, et al. v. First Bank of Crossville.]

of the note. The true fact as to the sale of the note, or the obtaining of the accommodation from the bank, may be shown by the evidence. On the other hand, at the trial a defendant would have the right to show that he is not primarily liable, or that he is not liable on the note as a maker but only as an indorser.—*Long v. Gwin*, 188 Ala. 196, 202, 66 South. 88; *Randolph on Commercial Paper*, vol. 2, §§ 833, 841.

(5-8) No judgment can be annulled, arrested, or set aside, for any matter not previously objected to, if the complaint contains a substantial cause of action.—Code, § 4143. Judgments conforming to the cause of action set up in the complaint, and not foreign thereto, will be sustained.—Code, § 4143; *Kirkland v. Pilcher*, 174 Ala. 170, 57 South. 46; *Smith v. Dick*, 95 Ala. 311, 10 South. 845; *Ritch v. Thornton*, 65 Ala. 310; *G. St. R. R. Co. v. Hanlon*, 53 Ala. 70. An exception may be taken on the hearing of such a motion to any ruling or decision of the court, and a bill of exceptions may be signed and certified as a part of the record as in civil cases, and an appeal taken to this court.—Code, § 4145. Without a bill of exceptions, evidence is presumed to have been introduced at the trial, to support the judgment.—*Dobson v. Dickson*, 8 Ala. 252; *Burdeshaw v. Comer*, 108 Ala. 617, 18 South. 556; *Cruise-Splawn L. Co. v. Sorrell*, 165 Ala. 259, 51 South. 727; *M. & B. R. R. Co. v. L. & N. R. R. Co.*, 172 Ala. 313, 54 South. 1002; *Hanby v. Phillips & Buttorff Mfg. Co.*, 12 Ala. App. 543, 68 South. 477. No presumption, however, need be indulged as to the correctness of the court's ruling on the motion, for the record failed to show a judgment thereon.—*Gunter v. Mason*, 125 Ala. 644, 27 South. 843.

(9, 10) On the question of a substantial cause of action being shown by the complaint, it is said in *Amer. Bon. Co. v. New York & Mexican W. Co.*, 11 Ala. App. 578, 66 South. 847, that: "If the complaint in this case contained a substantial cause of action, and the judgment of the court is responsive to the complaint, the appellant cannot complain of errors or defects in the complaint which would have subjected it to demurrer.—*Stewart v. Goode, et al.*, 29 Ala. 476; *Kyle v. Caravello*, 103 Ala. 153, 15 South. 527; *Walker v. Mobile Marine D. & M. I. Co.*, 31 Ala. 530; *Harris v. Plant & Co.*, 31 Ala. 644; *Childress, et al. v. Mann & Co.*, 33 Ala. 207; *Mahoney v. O'Leary*, 34 Ala. 101; *Foster v. State*, 39 Ala. 229; *Douglass, et al. v. Beasley*, 40 Ala. 143; *Martin v. Rushton*, 42 Ala. 292; *Watson v. Knight*, 44 Ala. 354; *Leach*,

[Hall, et al. v. First Bank of Crossville.]

et al. v. Bush, 57 Ala. 153. And this is true, notwithstanding the complaint might have been subject to the objection of a misjoinder of causes of action in one and the same count.—*Walker v. Mobile M. D. & M. I. Co.*, *supra*; *Phillips v. Sellers*, 42 Ala. 661; *Whilden & Sons v. Merchants' & Planters' Bank*, 64 Ala. 27, 38 Am. Rep. 1. In other words, the court in construing the averments of the complaint in this case must adopt a liberal construction, and if, by treating all amendable defects as amended, it appears from the facts stated, whether well or illy pleaded, a substantial cause of action is stated, then it is sufficient to sustain the judgment."

(11) Since the judgment of February 18, 1915, was taken jointly against J. D. Hall and James A. Croley, if it can be said that the complaint was subject to demurrer as to the joinder, under its averments, of James A. Croley, the appellant J. D. Hall cannot complain on appeal. He was not injured. As the maker of the note he was primarily liable, and must have indorsed it to complete its negotiation to the plaintiff bank.—Section 184, Negotiable Instrument Act (S. S.) 1909, p. 154. If the assignment of error is not available as to Hall, it cannot be available to Croley, under the joint assignment.

(12, 13) The copy of the note as set out in the transcript cannot be looked to, in order that we may determine its nature and specific terms. We can consider its form only as averred in the complaint. The note and the other evidence on which the judgment was taken, the writ of inquiry was executed, and the motion was overruled was not presented by bill of exceptions. Such matters, not being so presented, are no part of the record.

(14, 15) It is true that, before an indorser would be liable for payment, notice of dishonor must be averred and proven as required by the statute. If the defect in this respect had been presented on the trial by Croley, proper amendment might have been made, or he might have been stricken as a codefendant.—Acts 1909, p. 141, § 89. And in *Caulfield, et al. v. Finnegan*, 114 Ala. 39, 21 South. 484, under a statute declaring when an indorser or assignor of a non-negotiable note would be bound, the court said:

"The complaint must aver performance of the condition, or the particular causes relied on as relieving from the duty of performance, freeing the indorsement or assignment from its conditional quality, converting it into an absolute engagement.

[Hall, et al. v. First Bank of Crossville.]

* * * Without such averments, the complaint would not only be subject to demurrer, but it would not contain a substantial cause of action, which, on error, would support a judgment against the assignor or indorser."

In the *Caulfield case*, *supra*, there was no embarrassment of a joint appeal and joint assignment of error as in the case at bar. It will not be said that a complaint, to state a substantial cause of action, where a note is drawn to the maker's own order and it is completed by his indorsement (as required by section 184, Neg. Inst. Act; Acts 1909 [S. S.] p. 154) must allege notice of dishonor, as provided by section 89 (*Id.* p. 141). It is specifically stated in said section 89 that the required notice of dishonor must be given to the drawer and to each indorser, "except as herein otherwise provided."

The maker of the note payable to himself knew that he had failed to pay at maturity; and, being primarily liable, he was not entitled to presentment for payment or to notice of dishonor.

(16) The trial court, in passing on the motion to set aside and vacate the judgment, must be presumed to have had evidence before it to justify the denial of the motion. The appellate court, in the light of the usual presumption of verity, and in the absence of a bill of exceptions presenting the facts of the trial, will presume that the instrument sued on fell within one of the classes where notice of dishonor was not required to be given an indorser, as where the instrument was made or accepted for his accommodation, etc.—Section 115, Neg. Instr. Act; Acts S. S. 1909, p. 144.

The cause is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

[Wheeler v. Standard Steel Co.]

Wheeler v. Standard Steel Co.**Injury to Servant.**

(Decided May 11, 1916. Rehearing denied June 30, 1916.
72 South. 254.)

Master and Servant; Injury to Servant; Unavoidable Accident.—Where a servant went upon an incline to chain cars so that they would not move, while he and his gang were repairing the gearing to a drum which moved the cars by means of cables, and was injured by a fellow servant falling and catching hold of a throttle lever, which action started the engine, thus moving the cars where the servant was working, such servant could not recover, since the accident was one not reasonably to be foreseen by the employer.

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

Action by Fred F. Wheeler against the Standard Steel Company, for damages for injuries suffered while in its employment. Judgment for defendant and plaintiff appeals. Affirmed.

W. J. BOYKIN, and J. M. MILLER, for appellant. HOOD & MURPHREE, for appellee.

GARDNER, J.—Suit by appellant against appellee for the recovery of damages for personal injuries, sustained by plaintiff while in the employment of defendant, and while in the performance of the duties of such employment.

Upon the conclusion of all the evidence in the case, the trial court gave the affirmative charge requested by the defendant, with hypothesis. This is the only question argued by counsel for appellant on this appeal. In brief of counsel for appellee there appears a very orderly and succinct statement of the most pertinent facts in the case, the correctness of which statement is not questioned by counsel for appellant in their brief filed in reply thereto; and, after a careful examination of the record, we have concluded to adopt this statement in this opinion. Counsel's statement of the facts is as follows: "Appellant was a member of what was known as the riggers' gang, whose duty it was to do general repair work at the plant of appellee. At the time he was injured, he and his gang had gone, under the direction of the

[Wheeler v. Standard Steel Co.]

superintendent of the gang, to the blast furnace for the purpose of repairing the gear of a drum, which was geared to a stationary engine and operated by said engine. Around the drum extended two wire rope cables, the ends of which were fastened to two skip hoist cars, called, in the evidence, gophers. The engine, which was geared to the drum, caused the drum to revolve, which in turn, by said wire rope cables, pulled the skip hoist cars up an inclined double railroad track, which double track extended from the ground upward at an angle to the top of the blast furnace. The gophers were used for the purpose of conveying iron ore, limestone, and other material to the top of the furnace to be dumped therein in the process of manufacturing pig iron. Along by the side of the inclined railroad track, extended from the ground to the top of the furnace a series of steps, enabling employees to go from the ground to the top of the furnace, or to any point on the inclined track by the use of such steps. On the occasion in question, appellant and his gang were engaged in repairing the gear of the drum. The drum and the engine to which it was attached were located in a small brick house underneath the inclined railroad track, and the wire rope cables extended from the ground upward through the roof of the house to the railroad track, and were attached to the two gopher cars operated thereon. It was necessary to chain the two gopher cars to the railroad track so that the cables attached to them could be slackened, in the repair of the gear of the drum. Appellant and one or two of his fellow servants were directed by their superintendent to go up the incline and chain the gopher cars to the incline. Before they undertook to do that work, the steam had been cut off of the engine which operated the drum by the proper setting of the steam throttle. In other words, the engine had been stopped by cutting off the steam. The gopher cars would not move and could not be moved except by turning on the steam and starting the engine, they being attached to the wire rope cables, which in turn were wound around the drum, and which in turn was geared to the engine. The throttle of the engine was opened and closed by a lever, which was from 6½ to 7 feet above the ground—a little higher than a man's head. The throttle lever was not immediately over the drum but was from three to four feet to one side. While appellant was on the inclined track, Harvey Russell, a member of the riggers' gang, and one or two others had gone into the engine house for the purpose of making ready

[Wheeler v. Standard Steel Co.]

to repair the gear of the drum, it being their duty to make such repairs. Russell had climbed up to near the roof of the engine house, for the purpose of doing some work there preparatory to repairing the gear of the drum. He was standing on the drum, and while standing there, his foot slipped, and in falling he involuntarily grabbed the throttle lever, thereby involuntarily opening the throttle and starting the engine, which moved one of the gopher cars against appellant, inflicting the injuries complained of. The evidence is without conflict that the gophers could not have been moved except by turning the steam on the engine for the reasons hereinbefore set out. There is no evidence that the throttle was defective or that it was an unusual one or was unusually equipped. Nothing appears from which the conclusion could be drawn that the throttle lever was not a proper contrivance."

While some counts seek recovery as for a defect in the ways, works, machinery, etc., it is quite clear that they find no support in the evidence, justifying the submission of any such issue to the jury.—*L. & N. R. R. Co. v. Hall*, 193 Ala. 648, 69 South. 106. Indeed, it is not so insisted on this appeal by counsel for appellant. In their elaborate brief appellant's counsel appear to rely more largely, if not entirely, upon count 9, which counted for recovery upon the negligence of one McDaniel, plaintiff's foreman, in that he ordered plaintiff to ascend to a great height from the ground and fasten the "gophers" to the track over which they ran, without first exercising reasonable care to see that the gophers were not moved while plaintiff was so in the act of fastening them with a chain.

It appears from the evidence without dispute, that the engine was in a brick house which was kept locked and was entered only when occasion demanded, it being operated from the outside by means of a pulley. The work to be done in the engine house was not on the engine, but was to take the gear off the drum, which was no part of the engine, but which was connected with the gear of the engine. As appears from the foregoing statement, the throttle lever was from three to four feet to one side of the drum, and about seven feet above the ground, and steam had been cut off the engine by the proper setting of the throttle. The throttle lever was about four feet above the drum. McDaniel, the foreman, said: "After I had the gopher stopped, I had the throttle put on the center, and cut the steam off the engine, done

[Wheeler v. Standard Steel Co.]

the best I can to keep it from moving." The evidence is without dispute that the engine was started on account of one of the members of the riggers' gang, one Russell, falling, while doing some work preparatory to repairing the gear of the drum. He was standing on the drum and his foot slipped, and in falling he involuntarily caught at the throttle lever, thereby opening the throttle and starting the engine.

Upon the question of negligence, this court, in the recent case of *Sou. Ry. Co. v. Carter*, 164 Ala. 103, 51 South. 147, made use of the following quotations which we think find some application here: "A much-quoted definition of negligence is that of *Blythe v. Birmingham Waterworks*, 11 Ex. 781, as follows: 'The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' In commenting upon this definition Mr. Pollock has said: 'Now, a reasonable man can be guided only by a reasonable estimate of probabilities.' If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither reject what he can forecast as probable, nor waste his anxiety on events that are barely possible.—Pollock on Torts, 36."

It is conceded by counsel for both parties that the trial court was actuated in his ruling by the recent case of *Tobler v. Pioneer Mining & Mfg. Co.*, 166 Ala. 482, 52 South. 86. That case bears very close analogy to the one here under consideration; and we are of the opinion that the underlying principle which controls the result in that case is conclusive of the case at bar. In the instant case, the undisputed evidence shows that the engine was started by the involuntary act of a coemployee of plaintiff's, a member of the riggers' gang. In the *Tobler Case* the starting of the engine was attributed to the wrongful act of a third person, though this person may also have been one of the employees of defendant; and, speaking of this question, the opinion says: "A wrongful act of independent third persons (it conclusively appears that this was such, though they may have been the servants of the master), not actually intended or reasonably to be expected by the master, is not the consequence of the master's

[Ex Parte Edwards.]

wrong, and he is not bound to anticipate the general probability of such acts."

In the present case, we hardly think that it could be contended that it was reasonably to be expected by the defendant that the employee, engaged in working the drum, would slip and fall, and, in the act of falling, involuntarily throw out his arm and happen to grasp the throttle of the engine a few feet away. That the plaintiff has been permanently injured seems clearly to appear, and the accident is deplorable. But we conclude, after a most careful examination of the evidence, that there has been shown no negligence on account of which liability can be fastened upon the master. This conclusion we think is fully sustained by the *Tobler Case*; and the affirmative charge was therefore properly given for the defendant.—*W. Ry. of Ala. v. Mutch*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Going v. Sou. Ry. Co.*, 192 Ala. 665, 69 South. 73; *Williams v. Woodward I. Co.*, 106 Ala. 254, 17 South. 517.

The judgment of the court below will therefore be affirmed.
Affirmed.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Ex Parte Edwards.

Mandamus.

(Decided April 13, 1916. Rehearing denied June 30, 1916.
72 South. 256.)

Unlawful Detainer; Removal of Cause.—The provisions of § 4283, Code 1907, are not applicable to an unlawful detainer action where an entry as a tenant must be proven under § 4263, and under § 4271, Code 1907, the title is not involved.

ORIGINAL petition in the Supreme Court.

Petition by Mary Edwards for mandamus to require the Law and Equity Court of Mobile to vacate an order, remanding an unlawful detainer case to a justice of the peace, and to restore the cause to the docket for trial. Writ denied.

FREDERICK G. BROMBERG, for petitioner. GREGORY L. SMITH & Son, for respondent.

[Ex Parte Edwards.]

SAYRE, J.—The Louisville & Nashville Railroad Company brought its action of unlawful detainer against the petitioner before a justice of the peace. Under the supposed authority of section 4283 of the Code, the case was removed on petitioner's motion into the law and equity court of Mobile for a trial of the title; but afterwards the court, upon motion of the plaintiff, remanded the case for trial before the justice of the peace. Thereupon petitioner applied to this court for a writ of mandamus to compel the judge of the law and equity court to vacate its last order, and to restore the cause to the docket for trial in that court.

Each count of the complaint alleged in substance that defendant had lawfully entered into possession, but, at the time of suit brought, unlawfully withheld the same from plaintiff. The action was unlawful detainer, as distinguished from forcible or unlawful entry and detainer, and it was never intended that the title to property should be tried in such action. Unless the defendant entered as tenant, the plaintiff could not recover, and it was immaterial where the title resided.—Code, §§ 4263, 4271; *Russell v. Desplous*, 25 Ala. 514.

Section 4283 of the Code only authorizes the removal of actions of forcible entry and detainer or unlawful entry and detainer to the circuit court or court of like jurisdiction for a trial of the title. Of actions of unlawful detainer, the circuit court can acquire jurisdiction by appeal only. It follows that the law and equity court, a court of like jurisdiction with the circuit court, properly corrected its ill-advised effort to assume jurisdiction by remanding the cause back for trial before the justice of the peace.—*Self v. Comer*, 166 Ala. 68, 52 South. 336.

Mandamus denied.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

[Holt Lumber Company v. Givens.]

Holt Lumber Company v. Givens.

Assumpsit.

(Decided April 6, 1915. Rehearing denied June 30, 1916.
72 South. 257.)

1. **Sales; Warranty; Evidence.**—Where an express warranty of the quality of the logs was established in an action for a breach of warranty in the sale of the logs, an implied warranty could not be invoked.

2. **Witnesses; Impeachment; Showing.**—While an absent witness may be impeached by proof of bad character, he cannot be impeached by proof of contradicted statements made in a showing for him, to effect a continuance, although such showing had been admitted by the opposite party, since the necessary predicate could not and cannot be laid.

3. **Appeal and Error; Review; Objections.**—Where evidence has been admitted, the trial court will not be reversed unless an appropriate ground of objection is made at the trial, or unless the evidence is plainly and palpably illegal.

APPEAL from Mobile Law and Equity Court.

Heard before HON. SAFFOLD BERNEY.

Action by the Holt Lumber Company, against Mrs. I. N. Givens, for deceit in the sale of logs and for breach of warranty. Judgment for defendant and plaintiff appeals. Affirmed.

Transferred from Court of Appeals.

The evidence tended to show that T. E. Broussard, as the agent of Mrs. Givens, carried to the Holt Lumber Company specifications for rafts Nos. 1 to 7, inclusive, made by Hector Smith and R. E. Grimes, and received from the Holt Lumber Company a check for \$3,650, after a submission of the offer made by the Holt Lumber Company to Mrs. Givens, and the contention is that a number of the logs were red-hearted and worthless. Plaintiff offered to show that, when a man is engaged in the log business, it was understood that, where the specifications offered to a purchaser showed a certain number of defective logs, the other logs listed on the specifications were represented as being sound logs. Plaintiff also offered to show a custom during the month of February, 1914, among dealers in logs in that port as to whether or not any shortage or defect in rafts of logs not shown by the specification would be made good by the seller.

[Holt Lumber Company v. Givens.]

The following charges were refused to plaintiff: (6) The court charges the jury that where goods were sold by description, and without opportunity for inspection before purchase, there is ordinarily an implied warranty, not only that the goods conformed to the description of the kind and specie, but also that they are merchantable and free from any unmarketable defect. (7) The court charges the jury that, where any commodity is sold without any express agreement as to quality, the vendor is nevertheless required to supply a merchantable article.

STEVENS, MCCORVEY & MCLEOD, for appellant. GORDON & EDINGTON, for appellee.

ANDERSON, C. J.—(1) The only object in attempting to show the custom prevailing as to specifications in the sale of logs was to establish an implied warranty that all the logs, other than those designated as unsound in the specification furnished the plaintiff, were sound. Whether the trial court did or did not err in excluding this evidence matters not, for, if error, it was rendered innocuous to the plaintiff by the subsequent undisputed evidence of Broussard, who admitted an express warranty as to all the logs, except the 26 mentioned in the specification as red-hearted, the witness said: "I did tell Mr. Holt that the logs were all right except 26 red-hearted ones." The undisputed evidence having established an express warranty as to all logs, other than the 26 red-hearted ones, there was no place for an implied warranty which can only be invoked in the absence of an express warranty.

There was no error in refusing plaintiff's requested charges 6 and 7. Whether correct statements of law or not, they were inapt as to the case at bar where an express warranty was shown.

(2) The only relevancy or pertinency of the statement of Smith to Holt, to the effect that the inspection was made by negroes and he signed the specifications, was to discredit Smith as a witness who had testified, by a showing, that he inspected the logs and that the specifications were correct. There was no predicate laid for this statement, and the plaintiff by admitting the showing disarmed itself of the right to contradict the same by statements and declarations of the absent witness. When a showing has been introduced for an absent witness, the opposite party may impeach the witness by proof of bad character, but

[Town of Albertville v. Hooper.]

this does not extend to an impeachment by proof of contradictory statements; the reason for this being that the necessary predicate cannot be laid.—*Gregory v. State*, 140 Ala. 16, 37 South. 259.

(3) It matters not upon what ground this evidence was excluded, for the action of the court in doing so will not be reversed, but the rule is different when the evidence is admitted; there the trial court will not be reversed unless an appropriate ground of objection was made, or unless the evidence was plainly and palpably illegal.

We do not discuss the other assignments of error, but it is sufficient to say that the trial court committed no reversible error and the judgment must be affirmed.

Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

Town of Albertville v. Hooper.

Assumpsit.

(Decided May 18, 1916. Rehearing denied June 30, 1916.
72 South. 258.)

1. **Taxation; Execution; Summary Remedy.**—Under § 1313, Code 1907, an execution issued for taxes is a nullity unless there has been written assessment of the property to the owner.

2. **Same; Assessment.**—The term “assessment” commonly includes both the preparation of a list comprising a description of the persons or property liable, and an estimate of the value of the property.

3. **Same; Necessity.**—An assessment is an indispensable prerequisite to the validity of a tax against an individual.

4. **Same.**—Where the assessment books showed no personal property and made no reference thereto, except certain entries in red ink, explained orally as being the method of designating personal property values, and the assessment roll was not made by any authorized person, the assessment was a nullity.

5. **Same; Wrongful Sale; Remedy.**—Where, without authority of law, a municipality sells property under tax execution, the owner may waive the tort, ratify the sale, and recover the purchase money received by the municipality.

6. **Assumpsit; Nature.**—A general assumpsit is an equitable action in its nature.

7. **Same; Defenses.**—In general assumpsit no recovery can be had of money which ex aequo et bono belongs to defendant.

[Town of Albertville v. Hooper.]

8. Taxation; Unlawful; Recovery.—It is no defense to an action to recover the value of property sold for taxes, to say that the tax payer may be ultimately liable for such taxes, since to allow such defense, would be to legalize the trespass.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Assumpsit by J. F. Hooper against the town of Albertville to recover for property unlawfully sold for taxes. Judgment for plaintiff and defendant appeals. Affirmed.

Transferred from Court of Appeals.

The action is by a citizen of the town of Albertville to recover a sum of money paid by him through his agent as purchase money for certain chattels sold by defendant municipality under a general execution against plaintiff for the satisfaction of an alleged judgment for municipal taxes on his personal property subject to taxation in said town. The execution was regular on its face, and was issued under the authority of the town counsel regularly expressed. The assessment upon which it was founded is shown to have been in the following form: In the first column of the assessment book, against plaintiff's name, items of real estate appear. In another column, headed "Total Value of R. E.," appears in black ink the amount of \$6,700, and in red ink the amount \$66,678. There is no column showing personal property assessed, nor is there any reference to personal property. In the final column, headed "Total Taxes," appears the entry "33.50 R. est.," and under it the entry, "333.29 P. P." The compiler of the separate book explains that the figures in red ink related to personal property.

MCCORD & ORR, and GOODHUE & BRINDLEY, for appellant.
STREET & BRADFORD, for appellee.

SOMERVILLE, J.—(1-3) An execution issued by the town clerk under section 1313 of the Code, for the collection of delinquent taxes, is manifestly a complete nullity unless there has been a written assessment of the defendant's property.

"The term (assessment) commonly includes two distinct processes: First, the preparation of a list by the proper officers, comprising a description of all the persons or property found within the jurisdiction, and liable to contribute to the particular tax; and, second, an estimate by the assessors of the value of the

[Town of Albertville v. Hooper.]

property, of whatever character it may be, which is to be called on to contribute, thus forming the basis of an apportionment of the whole tax among the taxable persons within the district. The list, when thus completed, is usually denominated the 'tax list' or 'assessment roll.'"—Black on Tax Titles (2d Ed.) § 89.

"The assessment is an indispensable prerequisite to the validity of a tax against any individual, for without a valid assessment there can be no lawful attempt to collect the tax or to enforce it against any specific property. Mere irregularities in the assessment will not affect its validity, but only such omissions or defects as go to the jurisdiction of the assessors, or deprive the taxpayer of some substantial right."—37 Cyc. 987b.

(4) In the instant case nothing had been done by the municipality which can, even by the most liberal courtesy, be designated as an assessment of the plaintiff's personal property. The required assessment is not merely irregular or defective; it is simply nonexistent. For, certainly, the simple entry of the total amount computed as a personal property tax is not an assessment, without some sort of listing of the property itself.

Again, the assessment roll must be made by the city clerk or some person authorized by the town council. This assessment roll was not made by an authorized person, and apparently he merely copied the total assessed value of personalty from the county assessment book for the preceding year, without any reference to the items or the mass of property to be taxed; in short, it does not appear from the book that plaintiff owned any personal property whatever. Hence jurisdiction of the personalty was never acquired by the municipality.

Our judgment is that the assessment was a legal nullity; that there was nothing to support the execution under which plaintiff's property was seized; and that the sale of it was a sheer conversion by the municipality, without any authority of law.

(5) In such cases it is well settled that the owner may waive the tort, ratify the sale, and recover the purchase money received by the tort-feasor.—*Lewis v. Dubose*, 29 Ala. 219, 220; *Blackshear v. Burke*, 74 Ala. 239; 4 Cyc. 332 (111).

There is no escape from the conclusion that plaintiff was entitled to recover the amount awarded by the verdict, and the jury were properly instructed to so find.

(6, 7) It is true, as argued by counsel for appellant, that general assumpsit is an equitable action, and under it a recovery

[Sulzby v. Palmer.]

should not be allowed of money which ex æquo et bono belong to the defendant. But the authorities cited in that behalf have no application to a case where property has been tortiously seized under a writ issued on an assessment that is wholly void, and not merely irregular or defective. A summary of these authorities will be found in the text of 37 Cyc. 1174, 1175; C: "An action at law may be maintained to recover taxes where they were wrongfully and illegally assessed and collected. * * * But no such action can be based on *mere irregularities or informalities*, in the assessment not affecting the substantial justice of the tax." (*Italics supplies.*)

(8) An equitable right to money cannot arise out of a trespass. To hold that the defendant municipality can equitably retain the money received from an unlawful seizure and conversion of the plaintiff's property would be to sanction and legalize the trespass itself.

The trial judge properly instructed for the plaintiff, and the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

Sulzby v. Palmer.

Bill to Foreclose Mortgage.

(Decided January 20, 1916. 70 South. 1.)

1. **Equity; Pleading; Verification.**—The provisions of § 5332, Code 1907, are applicable to pleadings and proceedings in equity.

2. **Same.**—Section 3967, Code 1907, is also applicable and extends to proceedings in equity.

3. **Deeds; Presumption.**—Where the official certificate of the acknowledgment of a conveyance conforms substantially to the statute, it is presumed to be true, unless the execution is denied by a sworn plea, and authorizes the conveyance to be read in evidence.

4. **Same; Delivery; Proof.**—Where a purported deed is shown to have been signed by the grantor, acknowledged and duly certified and recorded in the county in which the land lies, and there is no proof to the contrary, such proof is sufficient proof of completed execution by delivery.

5. **Same; Acknowledgment; Authorization of Officer.**—Before an officer is authorized to certify the acknowledgment of a purported deed there must be in fact an acknowledgment by the grantor of the instrument signed.

[Sulzby v. Palmer.]

6. **Pleading; Instrument; Burden of Proof.**—Where § 3967, Code 1907, is complied with by filing a plea of non est factum in a suit on a written instrument, the burden of proving the instrument is cast upon the complainant.

7. **Same; Non Est Factum.**—The want of an affidavit to the plea of non est factum is a defect available on demurrer.

8. **Same.**—Where the action is on a note, a plea averring that the date of the note has been changed since it was signed is a plea of non est factum.

9. **Same; Foreclosure; Execution.**—Where the suit was to foreclose a mortgage and respondent by cross bill denied the execution of the notes and the mortgage by a sworn plea therein, respondent did not thereby undertake the burden to disprove the mortgage on which the foreclosure was sought, but the burden was upon complainant to prove the execution of the notes and mortgages, when offered in evidence (§ 3967, Code 1907).

10. **Mortgages; Foreclosure; Burden of Proof.**—Where the suit was for the foreclosure of a mortgage, and the recorded mortgage, which referred to the note, and the note, were introduced in evidence, the introduction of the recorded mortgage prima facie discharged complainant's burden of proof as to its execution under § 3374, Code 1907, but did not discharge the burden as to the note; the execution of both note and mortgage being denied by sworn plea.

11. **Acknowledgment; Witnesses.**—Where the execution of the mortgage sought to be foreclosed is denied by sworn plea, the affirmative testimony of interested witnesses as to the falsity of the officer's certificate of acknowledgment will be scrutinized carefully in the light of their interest, but will be given the same weight as the testimony of other interested witnesses, if full and direct.

12. **Evidence; Handwriting.**—Where the execution of the mortgage and note was denied by sworn plea, the admission in evidence, over objection, of a genuine specimen of respondent's handwriting for the purpose of comparison with the signature of the note and mortgage, was erroneous, as a comparison of handwriting may not be instituted between a writing in question and genuine extraneous papers, whether the comparison is to be by the jury trying the case, or through the expression of opinion by an expert.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by James F. Sulzby against Mary Palmer to foreclose a mortgage. Decree for respondent and complainant appeals. Affirmed.

W. T. HILL, and JAMES A. MITCHELL, for appellant. THOMPSON & BACHRACH, for appellee.

(This case appears in 194 Ala. 524, but because of the omission of a page from the opinion, eliminating an important part of the opinion, growing out of an error of the Reporter or the printer, it is reproduced here.—Reporter.)

[Sulzby v. Palmer.]

THOMAS, J.—Appellant, James F. Sulzby, filed his bill to foreclose a mortgage. Appellee, Mary Palmer, by answer and cross-bill under oath, denied the execution of the notes, and of the mortgage securing the same, and prayed the cancellation of the same as a cloud on her title.

(1) The statute requiring that a plea denying “the execution by the defendant, his agent or attorney, or partner, of any instrument in writing, the foundation of the suit, or the assignment of the same” must be verified by affidavit, applies to proceedings in equity as to those in courts of law.—Code 1907, § 5332; *Bonner v. Young*, 68 Ala. 35; *Dreyspring, Admr., v. Loeb*, 119 Ala. 282; *Noble, et al. v. Gilliam*, 136 Ala. 618; *Henderson v. Brown*, 125 Ala. 567.

(2) Every written statement, the foundation of a suit, purporting to be signed by the defendant, his partner, agent or attorney in fact, “must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit.”—Code 1907, § 3967.

In the case before us the eighth paragraph of the appellee’s answer and cross-bill is verified by the affidavit of respondent in the court below, and denies the execution of the notes and of the mortgage, foreclosure of which is sought.

We have for consideration, then, the burden of proof on appellant, to establish the material allegations of the bill, which embraces proof of the existence of the debt and of the execution of the notes and mortgage securing the same.

The original notes and the mortgage are before us for inspection. The notes import a consideration, and purport to be signed by appellee. The mortgage contains a certificate of acknowledgment. It has been the ruling of this court that the body of an instrument may be looked to, in aid of the probate.—*Bradford v. Dawson*, 2 Ala. 207; *Gates v. Hester*, 81 Ala. 357; *Frederick v. Wilcox*, 119 Ala. 355, 358; *Middlebrooks v. Stephens*, 160 Ala. 282.

(3) Where the official certificate of the acknowledgment conforms substantially to the statute, it authorizes the conveyance to be read in evidence.

(4) It is the rule that when a purported deed is shown to have been signed by the grantor, and to have been acknowledged, and duly certified by a proper officer, and recorded in time in the office of the judge of probate of the county in which the lands

[Sulzby v. Palmer.]

lie, and there is no other proof to weaken the force of these facts, this is sufficient proof of complete execution by delivery, although there is no direct proof of delivery.—*Ward v. Ross*, 1 Stew. 136; *Frisbee v. McCarty*, 1 Stew. & Port. 56; *Elsberry v. Boykin*, 65 Ala. 336; *Gulf Red Cedar Co. v. Crenshaw, et al.*, 169 Ala. 613; *Culver, et al. v. Carroll*, 175 Ala. 469.

(5) In *Orendorff v. Suit, et al.*, 167 Ala. 563, the court declared that the casual presence of a putative grantor and the possession of an instrument purporting to have been signed are not of themselves sufficient to confer jurisdiction. There must be an acknowledgment, by the grantor of the instrument signed, before the officer is authorized to certify the acknowledgment.—*Byrd v. Bailey, et al.*, 169 Ala. 452.

The statutory rule provided by the act (Acts, Sp. Sess. 1909, p. 14) is that "Conveyances of property, real or personal, or any interest therein, whether absolute or on condition, which are acknowledged or proved according to law, and recorded, may be received in evidence in any court without further proof; and if it appears to the court that the original conveyance has been lost or destroyed, or that the party offering a transcript, had not the custody or control thereof, the court must receive the transcript, duly certified, in the place of the original, unless the reputed maker is in bona fide possession of the property and makes and files an affidavit that the said conveyance is a forgery."

The statute (Code, § 5332), requiring the verification of all pleas denying the execution by the defendant of an instrument in writing, the foundation of the suit, is as follows: "All pleas in abatement, unless it be a matter of record, pleas which deny the execution by the defendant, his agent or attorney, or partner, of any instrument in writing, the foundation of the suit, or the assignment of the same, or which set forth any instrument in writing, whether under seal or not, which is alleged to be lost or destroyed, and pleas since the last continuance, must be verified by affidavit."

(6) Where the statute (Code, § 3967) is complied with by filing the plea of non est factum, the burden of proving the execution of the instrument, the foundation of the suit, is upon the complainant.

(7) The want of an affidavit to a plea of non est factum is a defect available on demurrer.—*McWhorter v. Lewis*, 4 Ala. 198;

[Sulzby v. Palmer.]

Bryan, et al. v. Wilson, 27 Ala. 208; *M. & M. Ry. Co. v. Gilmer*, 85 Ala. 422; *Lesser v. Schloze*, 93 Ala. 338.

(8) In an action on a promissory note, a plea averring that the date of the note has been changed since the defendant signed it is a plea of non est factum.—*Dexter v. Ohlander*, 89 Ala. 262; *Lesser v. Schloze*, 93 Ala. 338. So in *Milligan v. Pollard*, 112 Ala. 465, a plea averring that defendant's intestate was insane at the time he gave the note sued on, was held to be essentially such a plea.

There can be no doubt that the matter alleged in paragraph eight of respondent's cross-bill, added by way of amendment, amounted in legal effect to a plea of non est factum; and if verified by affidavit as provided in § 3967 of the Code of 1907, it prevented the notes from being received in evidence without proof of execution by complainant.

What is a sufficient verification was declared in *Berry, et al. v. Ferguson, et al.*, 58 Ala. 314, where the court stated that the plea must be direct and positive, though the affidavit of its truth may be made on information and belief; that the qualification must not be in the plea but may be in the affidavit. Again, in *McCoy v. Harrell*, 40 Ala. 232, it was held that the recital of the plea, that the defendant "makes oath that this plea is true," the record showing that the plea was sworn to before the clerk, is a sufficient verification, although it was signed by his attorney and not by the defendant. In *Martin v. Dortch*, 1 Stew. 479, 481, it was said that the defendant, by special plea stating the circumstances, may deny the legal effect or the validity of the bond on which he is sued; and that if the facts averred are in legal effect to say, that the instrument declared on was not the act of the defendant, is not the instrument signed by the defendant, it is a plea of non est factum, and that a verification thereof, to the best of affiant's knowledge and belief, would present the issue sought to be raised.

In *Winston v. Moffet*, 9 Port. 518, Mr. Justice Ormond dismisses this question by saying: "In all cases in which a plea is required to be sworn to, it may be done, by the person swearing, to the best of his knowledge and belief." To the same effect was the holding in *The Trustees v. Brown*, 3 Ala. 326.

In *Tindal, Adm'x, v. Bright*, Minor, 105, the Chief Justice said: "The statute requires that the plea shall be accompanied with an affidavit of its truth, but does not prescribe the form

[Sulzby v. Palmer.]

and manner in which the matter shall be set forth, or that the affidavit shall be general or special. As affected by the statute, it certainly cannot be important whether the party swears generally that his plea is true, or swears to facts, from which its truth must necessarily be inferred. * * * It is certainly more safe, both as to the conscience of the defendant and the rights of the plaintiff, to state the facts specially."

In *Mobile & Mon. Ry. Co. v. Gilmer*, 85 Ala. 422, the court gave the statute a liberal construction.

It is significant that the early decisions referred to were under a statute providing, "that no plea of non est factum shall be admitted to be pleaded, but when accompanied with an affidavit of its truth" (Toulmin's Digest, Laws of Alabama, § 33, p. 454); and that the later statute (Code 1907, § 3967) requires no such affidavit of "its truth," but only that it be "denied by plea verified by affidavit." This change is found in § 2279 of the Code of 1852, and has been continued in the subsequent codes as first made. In this we see not only a liberal construction of the statute by the decisions of our court, but a liberal legislative construction of the verification of such pleas that has continued to the present time.

The cases on this point, cited by appellee's counsel, are inapt.

In *Burgess v. Martin*, 111 Ala. 656, where the plaintiff was praying for discovery and for the appointment of a receiver, the court gave approval to the expression, "has been informed and believes and upon such information and belief charges the facts to be, etc." Is this not authority for the instant case, where the amendment charges specifically and positively what the facts are, and that affiant "makes oath that this is true?" So, in the case of *Smothers v. Meridian Fert. Factory*, 137 Ala. 166, it was held that where the verification to a bill in chancery is made by counsel for complainant, and the facts therein are alleged upon "his best information and belief," the same is insufficient, in that it does not amount to a charge, that affiant has been informed and believes and upon such information and belief charges the facts to be true. In *Globe Iron Roofing, etc., Co. v. Thacher*, 87 Ala. 458, the statute there in question required that the claim of an original contractor or materialman must be verified "by the oath of the claimant, or some other person having knowledge of the facts."

[Sulzby v. Palmer.]

In each of the cases of *Dennis v. Coker*, *Admr.*, 34 Ala. 611, and *Pickle's Admr. v. Ezzell*, 27 Ala. 623, where the question of the sufficiency of proof of a claim against insolvent estates was for decision, the court held that the statute required "all claims against insolvent estates to be verified by the oath of the claimant, or of some other person, 'who knows the correctness of the claim, and that the same is due;'" and that the particular affidavit under scrutiny could not be regarded as a fulfilment of this requisition, "since it does not show that the party (making the proof) had any knowledge either as to the correctness of the claim, or that it was then due."

(9) In the instant case, having filed her sworn answer and made it a cross-bill, the respondent, Palmer, did not thereby undertake the burden of disproving the notes or the mortgage on which foreclosure was sought. The title of the complainant, and his right to a foreclosure, was the issue; and the existence of the debt and the execution of the notes and mortgage were facts denied by a sworn plea or answer.

(10) We have two statutes pertaining to the proof of written instruments, which are applicable and pertinent, reference to which is necessary to a correct decision of this case. These statutes are §§ 3967 and 3374 (as amended, Acts 1909, p. 14) of the Code of 1907. The effect of the first, is to provide that the proof of a written instrument the foundation of the suit, is not an issuable fact, unless the execution thereof is denied by an appropriate sworn pleading, a plea, answer, etc. If the execution of such instrument be denied by such pleading, then the burden is on the proponent to introduce proof of the execution of such instrument; this burden, by virtue of § 3374 of the Code, he *prima facie* discharges by offering the instrument in question, duly recorded as provided by § 3374 of the Code. This is not, however, conclusive proof of the execution, but only *prima facie*. In the event of a note and mortgage, as in this case, both being the foundation of the suit, the mortgage being recorded but not the note, and the execution of both being denied by a sworn plea, as in this case, the introduction of the mortgage, recorded as provided by the statute, would discharge the burden of proof as to the execution of the mortgage, but not as to the note, which was not recorded but was merely referred to in the mortgage. Such was the holding of this court in the case of *O'Bannon v. Myers*, 36 Ala. 551, and in the case following that of *Scott v.*

[Sulzby v. Palmer.]

Cotten, 91 Ala. 623. It is said in these cases that the recital of an instrument, in another, is, as a general rule, primary and conclusive evidence of such instrument; yet it is not sufficient in a case like the one in hand, to overcome the sworn pleading denying the execution of the instrument to which reference is so made. What was said in *O'Bannon's Case*, *supra*, is both apt and conclusive here:

"The admission contained in the mortgage is not sufficient evidence to overcome the positive denial of the answer: it is not equivalent to the testimony of two witnesses, or of one with corroborating circumstances. The complainants have, therefore, failed to establish the existence of the debt, as described in the mortgage and averred in the bill."

(11) When witnesses testifying affirmatively of the falsity vel non of the certificate, are interested, their testimony will be scrutinized carefully, in the light of their interest; and when such testimony is full and direct, it is entitled to the same weight that would be given to the testimony of any other interested witness.—*Barrett v. Proskauer*, 62 Ala. 486; *Freeman v. Blount, et al.*, 175 Ala. 655.

The testimony of the respondent's witnesses is full and direct. The defendant and her two daughters are interested, and their testimony should be regarded in the light of their interest. The testimony of the step-children cannot be said to be affected by the same degree of interest. Under the allegations of the bill, Carlos Veitch was likewise interested in the result of the suit, and his testimony should be tested in the light of that interest. He made application for the loan, furnished the abstract, paid for it himself, delivered the mortgage to the attorney for complainant, received the money on the mortgage, deposited it in the bank in his name. He explained that it was for the benefit of appellee and her family that he acted, yet his testimony also showed that he had received large sums of his sister's (appellee's) moneys from the proceeds of sales of her properties, or those of her husband's estate, in Mississippi, and deposited it in his own name and expended it in due course as he saw fit; that he had no settlement therefor with appellee or her children, though requested to account, by them.

Mr. Veitch said, in the beginning of his testimony: "I explained to her that I was *going* to make this loan in order to build the house. To the best of my recollection I explained to

[Sulzby v. Palmer.]

her I was making this loan of Mr. Sulzby in order to build this house. I told her that I thought she ought to borrow about \$1,500.00." His testimony was to the effect that he was "going to make this loan," but he did not positively inform his sister that he had made the loan, or when the loan was completed. He did not take the check therefor in her name, did not inform her that complainant had paid the money to him, nor that he had deposited it to his credit at the bank and was using it as he saw fit. When the notes matured he secured the extension of time, and made payment thereon of his own funds. No knowledge was shown in respondent, by Veitch or complainant, of the maturity of the notes or of any payment made thereon, till several years thereafter, when Veitch had ceased to live with respondent. This conduct shows the interest of Veitch.

Touching the execution of the notes and mortgage, Veitch testified that the signature to the notes and mortgage shown him by counsel, was that of respondent, but that he was not present when these papers were executed. On his cross-examination he said, "I did not see Mrs. Palmer sign Exhibits A, B, and C," the notes and mortgage in question. "I swore on direct examination that I knew her signature and that was her signature to the best of my knowledge." "I did not see her sign it, therefore, I do not know it to be her signature."

Complainant states that on approval of the title by his attorney he drew and delivered his check for the amount payable to Carlos Veitch. No power of attorney or letter of instruction from respondent to complainant, to pay the money to Veitch, is shown.

An inspection of the small credits endorsed on the notes, shows that all the interest was not paid at maturity, and that the principal was long past due. Complainant admits that no demand was made on respondent until four years after the maturity of the mortgage. Complainant was lending money, and Veitch was a wholesale grocer. From 1904 to 1909 they lived in the same city with Mrs. Palmer, yet no request for the payment of the matured loan was made on respondent. This was an unusual indulgence, and one that the evidence does not sufficiently explain, if Mrs. Palmer was looked to for payment.

The respondent swears positively that she did not sign the notes or mortgage, nor authorize anyone to do so for her; that the signature thereto was not hers; that she was not before the

[Sulzby v. Palmer.]

notary, Jno. T. Hood, and did not acknowledge the signature to the mortgage before him; that she never saw the notes and mortgage before their exhibition at the trial. Her three step-daughters and her own daughter each swore positively that the signature to the notes and the mortgage was not that of Mrs. Mary Palmer, the appellee, and that they each were familiar with her handwriting and signature.

(12) The testimony of the several experts on handwriting did not show the signature to the several exhibits to be that of Mrs. Mary Palmer, the appellee. They did not know her signature; but they testified that the several exhibits, the notes and mortgage in question, were signed in the same handwriting. This effort to prove signature and execution by comparison of handwriting was duly objected to on the trial.

As early as *Little v. Beazley*, 2 Ala. 703, and *State v. Givens*, 5 Ala. 754; and in the cases of *Bishop v. State*, 30 Ala. 41; *Kirksey v. Kirksey*, 41 Ala. 626; *Williams v. State*, 61 Ala. 33, 39, and *Moon, Admrs., v. Crowder*, 72 Ala. 79, it was held that the comparison of a given handwriting with that of different submitted writings, having no connection with the matter at issue, is not permissible. This was the rule declared in 2 Starkie on Evi., p. 515, and in 1 Greenl. on Evid., § 580, and also by our court in the recent cases of *Washington v. State*, 143 Ala. 62, and *Griffin v. Working Women's Assn.*, 151 Ala. 597.

In *Griffin v. Work. Women's Assn.*, *supra*, this court, from its former adjudications, declared as the well settled rule, that (1), "A comparison of handwriting may not be instituted between the writing that is in question and extraneous papers, although such extraneous papers may be shown to be genuine. A writing, although admitted to be genuine, when not otherwise relevant and admissible in evidence, is not admissible for the sole purpose of instituting a comparison of handwriting, whether by the jury trying the case or for the expression of an opinion by one examined as an expert witness."

(2) When the forgery of a paper is in issue, and another paper admitted or proven to be *genuine is properly in the case* and before the court, a comparison may be instituted between the signature of the genuine and the signature of the disputed one. The comparison may be made by the jury trying the case, for the purpose of determining the question of forgery vel non of the disputed paper; or an expert witness may also make a

[*Ex Parte Barrett Brothers Shipping Co.*]

comparison in such case of the two signatures, and after such comparison, express his opinion as to the genuineness of the paper in dispute.

(3) That non-expert witnesses may not express an opinion as to genuineness of signature, unless such witnesses know the handwriting of party from having corresponded with him or seen him write.

The register erred in admitting, over the objection of the respondent, Exhibits "A-A," and "B-3." These documents not being properly before the court, a comparison may not be instituted between the signatures thereto and the signatures to Exhibits A, B, and C, for the purpose of identification of the signatures to the latter.

On consideration of the evidence, with a due regard for the burden of proof, and without presumption in favor of the finding of the chancellor, we are of the opinion that the alleged notes and mortgage were correctly cancelled as a cloud on complainant's title to the lands described in the mortgage and in the original bill in this case.

The decree of the chancellor is affirmed.

Affirmed.

ANDERSON, C. J., MAYFIELD and SOMERVILLE, JJ., concur.

Ex Parte Barrett Brothers Shipping Co.

Assumpsit.

(Decided June 8, 1916. 72 South. 259.)

1. **Appeal and Error; Review; Court of Appeals.**—The Supreme Court will not review the findings or conclusions of the Court of Appeals on matters of fact only, nor review such findings nor conclusions to ascertain whether the legal principles applied by that court to the facts should have been applied thereto.

2. **Evidence; Documentary.**—Daily reports made in the regular course of business in the nature of original entries are admissible in evidence and are *prima facie* correct.

CERTIORARI to Court of Appeals.

Application by Barrett Brothers Shipping Company for certiorari to the Court of Appeals to review and revise the judg-

[Ex Parte Barrett Brothers Shipping Co.]

ment of said court in the case of *C. H. Minge & Co. v. Barrett Bros. Shipping Co.*, 14 Ala. App. 468, 70 South. 962. Writ denied.

GEO. B. CLEVELAND, JR., for petitioner. BESTOR & YOUNG, contra.

MCCLELLAN, J.—This petition for certiorari to the Court of Appeals is to review the conclusions of that court as set forth in *Minge & Co. v. Barrett Bros.*, 14 Ala. App. 468, 70 South. 962-965; the particular rulings of the court against which complaint is made being set down in the response to the application for rehearing.

(1) The first ground of criticism of opinion and of conclusion is predicated of the asserted error of the court in its finding on the facts. It is settled here that this court will not, in observance of its duty under section 140 of the Constitution, review the findings or conclusions of the Court of Appeals upon matters of fact only, nor review such findings or conclusions with the view to the ascertainment or determination of the inquiry, whether legal principles applied by that court to the decision of the appeal should have been applied thereto.—*Ex parte Steverson*, 177 Ala. 384, 389, 58 South. 992; *Ex parte Savannah Williams*, 182 Ala. 34, 37, 62 South. 63; *Ex parte State*, 181 Ala. 4, 8, 61 South. 53; *Ex parte Burnett*, 180 Ala. 540, 541, 61 South. 920.

(2) The other criticism is based upon the ruling that the trial court's failure to exclude, on motion, the "consolidated report," a "report" made up from the daily reports, was error. The Court of Appeals did not intend to rule that the "daily reports," made by the defendant's agent in the regular course of business, were inadmissible unless their correctness was otherwise shown. They were, if so made, in the nature of original entries, and prima facie correct.

The writ is denied.

SAYRE, GARDNER, and THOMAS, JJ., concur.

[Hershey Chocolate Co. v. Yates, et al.]

Hershey Chocolate Co. v. Yates, et al.

Motion for New Trial.

(Decided May 18, 1916. Rehearing denied June 30, 1916.
72 South. 260.)

1. **Judgment; Motion in Arrest; Grounds.**—Judgments can be arrested only for defects apparent of record, and defects which are amendable will not authorize the arrest or annulment of the judgment.

2. **Same.**—Under § 4143, Code 1907, mere defect in the form in the complaint or declaration must be raised by special demurrer, or other special pleading, and cannot be raised by motion in arrest of judgment.

3. **Appeal and Error; Review; Decisions Reviewable.**—An order granting a motion in arrest of judgment is not a final judgment, nor is it one of the interlocutory orders from which an appeal lies under the statute, and hence, such order will not support an appeal; where such appeal embraces no petition for mandamus in the alternative to correct the errors complained of, the appeal will be dismissed.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

The Hershey Chocolate Company brought suit against the Joseph A. Yates & Company, for the breach of a receiver's bond, and had judgment by default. On motion of defendant, the judgment was set aside and a new trial ordered, and plaintiff appeals. Appeal dismissed.

Transferred from Court of Appeals.

STERLING A. WOOD, for appellant. GEO. E. BUSH, for appellee.

MAYFIELD, J.—This appeal is from an order granting a motion in arrest of judgment.

(1) Judgments can be arrested only for defects apparent of record. Mere defects, however, which are amendable, will not authorize the arrest or annulment of a judgment.

(2) One of our statutes of jeofailes prohibits such action by trial or by appellate courts. Section 4143 of our Code is one, or a part of one, of the numerous statutes of jeofailes or amendments, passed first by the Legislatures of the various states. This one, as is well known, was intended to prevent the arrest or reversal of judgments as for mere defects in the form of the

[Hershey Chocolate Co. v. Yates, et al.]

declaration, complaint, bill, or petition, and to require that as to such formal defects advantage should be taken by special demurrer or other special pleading, so that such formal defect could be amended while the pleading was in fieri. Before the passage of such statutes, judgments were constantly arrested and reversed for merely formal defects, and though such defects were never complained of until after verdict and judgment.—*Kirkland v. Pilcher*, 174 Ala. 174, 57 South. 46; 7 Mayf. Dig. 476. So the object and purpose of this particular statute was to change this rule, and limit objections to the judgment; or to the motion in arrest thereof, or objections in proceedings to amend, to those of substance only; and, if the declaration, complaint, bill or petition contained a substantial cause of action, no objection could be taken to it on motion in arrest, or in independent proceedings to amend or reverse, unless the objection was previously made; that is, before rendition.—*Kirkland v. Pilcher*, *supra*.

(3) In this case, however, we cannot inquire into the correctness or incorrectness of the order arresting the judgment, for the reason that the order arresting or annulling the judgment is not a final judgment; nor is it one of the interlocutory judgments from which our statutes authorize an appeal. It is true that the effect of the order is to annul the final judgment and award another trial. The legal consequence is the same as that of an order granting a new trial, whether made during the term of the rendition or under the four-month statute, providing for rehearings in trial courts. The statutes of this state, authorizing appeals from orders or judgments granting or refusing to grant new trials, have been frequently construed by this court, for a quarter of a century, and held not to include orders or judgments like the one in question. In dealing with a case exactly like that here under consideration, the authorities were reviewed; and it was again decided by this court that an appeal would not lie from a judgment or order like the one here attempted to be appeal from. It was there said: "Judgment having been set aside in term time, and within 30 days after rendition, it was within the control of the court, and it had the discretionary power of setting same aside, and said action is not revisable under the four-month statute for rehearing at law, and which does not apply. Nor can such order support an appeal.—*Truss v. Birmingham*, 96 Ala. 316, 11 South. 454; *Allen v. Lathrop-Hatton Lumber Co.*, 90 Ala. 490, 8 South. 129; *Haygood v. Tait*,

[Central of Georgia Ry. Co. v. Carlock.]

126 Ala. 264, 27 South. 842; *Colley v. Spivey*, 127 Ala. 109, 28 South. 574. There being no remedy to revise the order vacating the nil dicit judgment so rendered, mandamus might be the appropriate remedy to revise the action of the court.—*Brazel v. New South Coal Co.*, 131 Ala. 416, 30 South. 832.—*Ex parte Parker*, 172 Ala. 137, 138, 54 South. 572.

These later cases on the subject have sanctioned the practice of allowing the appellant to incorporate in his submission a motion or petition for a writ of mandamus, as an alternative relief, to correct the errors complained of on the appeal. See *Brazel v. New South Coal Co.*, 131 Ala. 416, 30 South. 832; *Ex parte Tower Mfg. Co.*, 103 Ala. 415, 15 South. 836; *Ex parte Parker, supra*. There being no application here for mandamus, and the appeal not being authorized by statute, and the right of appeal being purely statutory, it follows that this record alone reveals the want of jurisdiction, which point we must take ex mero motu and dismiss the appeal.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Central of Georgia Ry. Co. v. Carlock.

False Imprisonment.

(Decided May 11, 1916. Rehearing denied June 30, 1916.
72 South. 261.)

1. **Master and Servant; Tort of Servant; Complaint.**—Where the action was for false imprisonment against a railroad and one of its employees, a count alleging "that defendant's servant acting within his authority, wrongfully arrested and imprisoned plaintiff," is not sufficient, since the definite ascription of the servant's authority is left wholly at large between the two defendants.

2. **Judgment; Requisites.**—An insufficient complaint cannot be made the predicate for a valid judgment.

3. **Master and Servant; Injury to Third Person; Negligence.**—Both the master and the negligent servant may be joined in an action for injuries caused by the servant's negligence.

4. **Same; Trespass by Servant; Parties.**—In an action against a servant for an unauthorized, unaided and unratified trespass, the master cannot be joined as defendant in a single count.

5. **Arrest; Mode.**—An arrest may be made without actual force, or without touching the body; it is sufficient if the party arrested is within the

[Central of Georgia Ry. Co. v. Carlock.]

power of the officer, and submits to arrest even as the result of a verbal command.

6. **Same; Nature.**—An arrest is the taking of the custody of another person for the purpose of holding or detaining him to answer a criminal charge or a civil demand, under real or assumed authority.

7. **False Imprisonment; Nature.**—Detention of a person by another with force, or against the will of the person detained, is an imprisonment in law; and if such detention is not rightful, it is unlawful.

8. **Same; Evidence.**—In an action for false imprisonment the answer of a witness that he thought plaintiff was arrested, is admissible where his subsequent testimony supports such statement.

(Thomas, J., dissenting.)

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by Walter H. Carlock against the Central of Georgia Railway Company, and another, for damages for unlawful arrest. From the judgment for plaintiff, the railroad company appeals. Reversed and remanded.

LONDON & FITTS, for appellant. HARSH, HARSH & HARSH, for appellee.

MCCLELLAN, J.—(1, 2) The appellee instituted this action against the railway Company, a corporation (appellant), and one H. C. Jones. The complaint contained three counts, the first and second charging the wrongful arrest and imprisonment of the plaintiff. The jury's consideration of these counts was forbidden by instructions given at the instance of the railway company. The third count thus appears in the transcript:

"The plaintiff claims of the defendants \$25,000, damages, for that, heretofore, to-wit, on the 15th day of April, 1913, defendant's servant or agent, acting within the line and scope of his authority as such, wrongfully arrested and imprisoned plaintiff for a long time, viz., for one day, and, as a proximate consequence thereof, plaintiff suffered the injuries and damages set out in the first count of the complaint."

As readily appears, this count would fix liability, for the damnifying consequences of the wrong charged, under the doctrine of respondeat superior. In order to avail of this doctrine, it was imperative that the pleader make certain, at least to a common intent, in whose services, of the two defendants, the derelict agent or servant was when he committed the wrong for

[Central of Georgia Ry. Co. v. Carlock.]

which recovery was sought. The count, as phrased, left entirely uncertain in whose service, of the two defendants, the derelict agent or servant was engaged when the wrong alleged was inflicted upon the plaintiff. In this state of the averments of the count, no other conclusion is possible under our authorities than that the count failed to state a cause of action; and, being so completely ineffectual, no valid judgment could be predicated of the count.—*Osborne v. Cooper*, 113 Ala. 405, 21 South. 320, 59 Am. St. Rep. 117; *L. & N. R. R. Co. v. Duncan & Orr*, 137 Ala. 446, 453, 455, 34 South. 988, and decisions therein cited. The fact that the latter decision, and others in its line, involved alternatives does not invite a conclusion that would render them inapplicable to the count under consideration. In those cases, the pleader had sought to at least declare, alternatively, upon theories of responsibility; whereas, in the count here in question, the pleader left the essential matter of definite ascription of the agent's authority in the premises wholly at large between two defendants. A judgment by default could not have been validly rendered on the count; for the court could not have known to which of the two defendants the derelict agent's wrong was ascribed by the pleading or was attributable as the basis for liability, under the doctrine of respondeat superior. There is nothing on the face of the count to justify this court in assuming that there was mere clerical error in the use of the singular, instead of the plural, possessive of the word "defendant" in describing and designating the principal or master of the agent or servant to whose conduct the liability was ascribed.

(3-7) Where the tortious conduct or omission relied on for a recovery is alone the result of negligence in the performance of duty on the part of an agent or servant, the principal or master and the derelict agent or servant may be joined as defendants in a single count (*South. Ry. Co. v. Arnold*, 162 Ala. 570, 578, 50 South. 293); but where the wrong committed by the representative is a trespass only, and the principal or master did not authorize, aid, abet, or ratify the wrongful act, the agent or servant cannot be made a joint defendant with his principal or master in a single count.—*South. Bell Tel. Co. v. Francis*, 109 Ala. 224, 231, et seq., 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930, opinion of Justice HEAD; *South. Ry. Co. v. Hanby*, 166 Ala. 641, 52 South. 334. An arrest may be effected without a touching of the body or actual force; it being sufficient if the party is within the power

[Central of Georgia Ry. Co. v. Carlock.]

of the officer and submits thereto, even as the result of verbal command.—*Field v. Ireland*, 21 Ala. 240; *Dougherty v. State*, 106 Ala. 63, 17 South. 393; 2 Rul. Cas. Law, pp. 445, 456; *Bissell v. Gold*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480, and note; 3 Notes on Am. Dec. p. 754; 5 C. J. pp. 385-387. "An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to answer a criminal charge or civil demand."—5 C. J., *supra*. Detention of a person by another, with force, or against the will of the person detained, is, in law, imprisonment; and, if the detention is not rightful, it is unlawful.—2 Words and Phrases (2d Series) p. 971; *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291, 7 L. R. A. (N. S.) 576. An arrest is an imprisonment.—*Blight v. Meeker*, 7 N. J. Law, 97, 98; *People v. Bancker*, 5 N. Y. 106, 123.

From the evidence, and inferences therefrom, in the bill of exceptions, it is quite clear that the issues whether plaintiff was wrongfully arrested and imprisoned on the occasion in question, and whether Jones, as agent or servant of the railway company, effected the wrongful arrest and imprisonment or participated therein were due to be submitted to the jury for decision.

(8) While there may be instances where a witness' statement that another was arrested, or that he saw another arrested, would be but an opinion or conclusion of the witness, yet it is common knowledge that the act or fact of arrest of one person by another or others is, in most instances, a so readily observable, unequivocal fact or fact as to fully warrant a witness in collecting the elements constituting the single act into a single affirmative statement that an arrest was made. There was no error in overruling the motion to exclude the answer of the witness Vaughn, to the effect that he thought plaintiff was arrested. The subsequent testimony of the witness showed, if credited, that his collective statement was justified by what he saw and heard.

The judgment is reversed and the cause remanded.

Reversed and remanded. All the Justices concur, except THOMAS, J., who dissents.

[Republic Iron & Steel Co. v. Howard.]

Republic Iron & Steel Co. v. Howard.

Injury to Servant.

(Decided June 8, 1916. 72 South. 263.)

1. **Master and Servant; Injuries to Servant; Course of Employment.**—If a servant voluntarily abandons the service his employment contemplates to assist another servant, and is injured while so engaged, the master is not liable.

2. **Same; Jury Question.**—Under the evidence in this case it was a question for the jury whether the servant injured was injured in the course of his employment.

3. **Charge of Court; Misleading.**—Where a charge given is merely questionable or possibly misleading, its giving will not be held error if the adverse party fails to request an explanatory charge.

4. **Same; Covered by Those Given.**—It is not error to refuse charges which are substantially covered by charges given.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by J. P. Howard against the Republic Iron & Steel Company, for damages for injury suffered while in its employment. Judgment for plaintiff and defendant appeals. Affirmed. Transferred from Court of Appeals.

PERCY, BENNERS & BURR, for appellant. ALLEN, FISK & TOWNSEND, for appellee.

MCCLELLAN, J.—Action for damages, by servant (appellee) against the master, on account of personal injuries received while engaged in the master's service. The two counts submitted to the jury were drawn to state a cause of action under the first subdivision of the Employers' Liability Act.—Code, § 3910.

The plaintiff, Stone, and King were employees of the defendant and were engaged in mining for their employer. At the time plaintiff was injured, he had responded to the request of King and Stone to assist them in easing a loaded car down an inclined tram track to a point where the motor, operated by the defendant's servants, would remove the car. The plaintiff's contention was that, while King and Stone were holding the car from its rear and he was pushing against it on its front, electric current

[Republic Iron & Steel Co. v. Howard.]

was communicated to the metal car, passed therefrom into Stone and King and caused them to release their holds upon the car, thus leaving the plaintiff to the unequal task of restraining the car on the incline. The car, he asserts, pushed him down until its collision with another car standing below pressed him between them and injured him. There was evidence tending to support the plaintiff's theory and to charge the defendant with negligence in failing to remedy the defect caused by the electrifying, at certain points on the tram track, of these cars with which the performance of their services required physical contact.

(1) It is insisted for appellant that plaintiff was not entitled to recover because he was injured at a time and in a service outside of the duties of his employment, viz., while he was voluntarily assisting King and Stone, or either, in letting down their or his loaded car. Of course, if plaintiff voluntarily abandoned the service his employment contemplated, and was injured while so engaged, defendant was not accountable to him in his action.

(2) Our opinion is that the defendant was not entitled to the general affirmative charge on that theory. There was evidence from which the jury might have concluded that the service in which plaintiff was engaged when injured was a service contemplated in his employment. The witness King testified:

"We used to help each other let the car down off the hill every time. We was all working there together, you know, in that way, and we had to help each other let the cars out of these rooms. * * * It took two men to show (shove) the car out of the room (to where it went down the hill, and it took about three to hold it."

He and the plaintiff testified that one man could not hold the loaded cars on the incline, that it took the efforts of all of them to hold the cars. The plaintiff testified that there was no other way of getting the car out than the one adopted; that "this was the method used in that mine for getting cars down the slope, one man holding behind and one in front;" that this was the usual method observed by these three men in moving the cars down the incline. If the jury accepted the testimony, offered by the plaintiff, going to show that the method observed on this occasion was the customary method for the performance of that service, and that it was the only practical method whereby the loaded cars could be moved down the incline, undoubtedly it then, at least, became a question for the jury whether this service was

[*Bank of Phoenix City v. Taylor.*]

within the range of plaintiff's duties under his employment.

(3) The court will not be put in error for giving, at plaintiff's request, the special instruction quoted in the second assignment of error. It would have been better to have affirmatively restricted the basis of plaintiff's right to recover to negligence charged in the complaint. If the defendant thought this charge possessed a possible tendency to mislead the jury—a very doubtful matter in view of the short and simple evidence to which the charge must be referred—an explanatory charge should have been requested by the defendant.

(4) The special instruction copied in the third assignment of error was substantially covered by another special instruction given for defendant. It was not error to refuse the substantial duplicate.

The judgment is affirmed.
Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

Bank of Phoenix City v. Taylor.

Assumpsit.

(Decided June 8, 1916. 72 South. 264.)

1. Evidence; Hearsay; Declaration of Agent.—Where the action was against a bank to recover for a deposit alleged to have been made, where the deposit was denied, evidence of a statement by the cashier was not admissible since the declaration did not relate to a matter in the course of the cashier's duty, but was merely narrative of past events, and was not binding on the principal of the bank; the question at issue being not the title of the bank to the money, but whether or not the deposit was made.

2. Same.—In such case, evidence that the cashier stated to another witness that Phelps made the deposit for his own benefit, and not for the benefit of plaintiff, was inadmissible.

3. Same; Admission Because of Other Evidence.—Irrelevant, incompetent or illegal evidence may be admitted to rebut evidence of like character; and while a hearsay declaration may be rebutted by evidence of a similar nature, the rebutting evidence must be directed, not to the ultimate facts, but to the hearsay declaration.

4. Banks and Banking; Deposits; Evidence.—Where the action was to recover deposits alleged to have been made, and the bank books were introduced in evidence, and did not show the deposits, evidence of defalcations by

[Bank of Phoenix City v. Taylor.]

the cashier which raised an inference that he converted the deposits, is admissible.

5. **Evidence; Collective Facts.**—A witness in a position to know may testify that a bank suspended business, without stating the facts on which he based his statement of the collective facts, as the party objecting has the privilege of cross examining as to the subsidiary facts.

APPEAL from Lee Law and Equity Court.

Heard before Hon. LUM DUKE.

Action by Henry Taylor against the Bank of Phoenix City to recover for a deposit. Judgment for plaintiff and defendant appeals. Reversed and remanded.

BARNES & BREWER, and N. D. DENSON & SONS, for appellant.
SMITH & WATKINS, and THOS. D. SAMFORD, for appellee.

SAYRE, J.—Appellee Taylor sued the appellant bank to recover a sum of money alleged to have been left on deposit with the bank. The witness Phelps testified that he had placed the money in question on deposit for the account of plaintiff, and in this he was corroborated by the witness Curetin. Plaintiff produced a passbook showing a credit in agreement with the testimony of these witnesses. Moses, who was cashier at the time, and his wife, who assisted in the work of the bank, the two being the only persons connected with the bank and present at the time, had both died before this suit was brought. The bank denied the deposit and brought evidence tending to show that the credit entry in the passbook was a forgery.

(1) Plaintiff's witness G. L. White had been bookkeeper for the bank, but his connection with it had ceased on February 1, 1913. He was allowed to testify, over defendant's objection, that on the day of the alleged deposit, to-wit, February 25, 1913, he was at the bank, something like an hour after the time of the deposit as fixed by the two witnesses mentioned above, and that the following conversation, which we quote in the language of the bill of exceptions, passed between him and Moses: "Mr. Moses said to me, 'Doesn't it beat hell how business keeps up?' and I said, 'Yes, what has happened now?' and he said, 'Mr. Connally (Connally was the bank's bookkeeper at the time) has just telephoned to me from the Clearing House (in Columbus, Ga., where he had gone to arrange the bank's clearings for the previous day) that he lost pretty heavily'—and to the best of my recollection he

[Bank of Phoenix City v. Taylor.]

said it was \$6,000. He said, 'I didn't know where I was going to get the money to pay that, but soon after that Charlie Phelps came in with a big deposit from Macon that he had been expecting.' "

The witness here interpolated: "We had been expecting it before I left there." Resuming his statement of what Moses said, the witness further testified: "He said Mr. Phelps came in and brought that big deposit from Macon, and he (Moses) reached over to the counter and picked up several rolls of currency, \$500 packages (witness indicating with hand about a span in thickness)."

This evidence as to what Moses said vitally touched the main, in fact the only disputed, issue in the cause, and in our judgment its admission was reversible error. Considered in connection with the other evidence, the versimilitude of this testimony was rather striking, and its effect may have been highly persuasive of plaintiff's case. But that may be the case with all hearsay, and its possible or probable effect cannot be allowed to set aside an established rule of evidence. To be admissible against the principal, the declarations of an agent must be within the scope of the authority conferred upon the agent and made while in the exercise of his authority. Where the declarations of an agent are merely narrative of a past transaction, they are hearsay and not competent against the principal. This rule applies in the case of private corporations. In *Cunningham v. Cochran*, 18 Ala. 479, 52 Am. Dec. 230, this court said: "We know of no rule of law that will justify the admissions, or declarations, of the president of a bank as evidence to charge the bank with a liability, merely on the ground that he is president. If in the discharge of a duty required of him by his office, or if he be an agent of the bank to do any particular act, and in the performance of such duty, or act, he makes an admission, which is part of the *res gestæ*, such admission, being part of the act itself, is admissible evidence against the bank, as would be the admissions of any other agent made under the same circumstances, or within the scope of his authority. The admissions of an agent, to bind his principal, must be made at the time of doing some act in the execution of his authority."

See, in this connection, *M. & C. R. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Southern Ry. v. Reeder*, 152 Ala. 227, 44 South. 699, 126 Am. St. Rep. 23.

[Bank of Phoenix City v. Taylor.]

That these statements of Moses were not of the *res gestæ* of the alleged receipt of money is clear.—*A. G. S. Ry. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *L. & N. R. R. Co. v. Pearson*, 97 Ala. 211, 12 South. 176. Nor can their admission be justified on the ground that they explained the possession of money. The question at issue was, not how or in what right Moses or the bank held any money in his or its possession, but whether indeed the bank, or Moses as its agent, had received any money from or on account of the plaintiff. The only material purpose and effect of this testimony, when referred to the only allegation of fact litigated between the parties, was to show that the certain money to which Moses referred had been previously received from plaintiff or his alleged agent Phelps. It did not explain possession, but related to title. Its purpose and effect was to demonstrate a then past transaction.—*Allen v. Prater*, 30 Ala. 458. The right in which the bank had held any money in its possession was not the fact in controversy, but the only disputed question was whether the bank had received any money from or on account of the plaintiff, and the solution of this question depended upon the finding as to a transaction that was past at the time of the conversation the witness was permitted to detail.—*Tomkies v. Reynolds*, 17 Ala. 109; *Barfield v. Evans*, 187 Ala. 579, 65 South. 928. This evidence was not brought within any recognized exception to the rule which excludes hearsay, and it should have been excluded.

(2, 3) In view of our conclusion to reverse the judgment in this cause on the point already stated, it is hardly necessary to pass upon that ruling by which the court excluded that evidence by which the defendant proposed to show that at a still later hour of the day Moses said to Connally, in effect, that Phelps did not make a deposit for plaintiff, but had made a deposit on his own account. This proffered testimony was incompetent, and will not be admitted on another trial. The rule that irrelevant, incompetent, or illegal evidence may be admitted without error to rebut evidence of a like character, must be limited to cases in which the rebuttal is confined to the evidential fact to which such evidence was first adduced. It is not contended, of course, that such evidence, once admitted, opens the way to the adverse party for the indiscriminate introduction of like evidence touching the ultimate facts in litigation. The rebuttal in such cases by irrelevant, incompetent, or illegal evidence, must be limited to such evidence

[Bank of Phoenix City v. Taylor.]

of the same character as tends directly and strictly to contradict that which has been received.—Jones on Evi. (2d Ed.) § 873, and authorities cited in note 36. The cases we have on this subject seem to point to the rule that the permissible office of such evidence in the way of rebuttal is merely to neutralize by direct contradiction the force and effect of the evidence improperly adduced by the adverse party, whether over objection or without objection.—*Findley v. Pruitt*, 9 Port. 195; *Havis v. Taylor*, 13 Ala. 324; *Ford v. State*, 71 Ala. 385; *Gandy v. State*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; *Morgan v. State*, 88 Ala. 223, 6 South. 761; *Winslow v. State*, 92 Ala. 81, 9 South. 728; *M. & B. R. R. Co. v. Ladd*, 92 Ala. 289, 9 South. 169; *McIntyre v. White*, 124 Ala. 177, 26 South. 937; *Gordon v. State*, 129 Ala. 113, 30 South. 30; *Longmire v. State*, 130 Ala. 66, 30 South. 413; *Lockridge v. Brown*, 184 Ala. 106, 63 South. 524. In *Smith v. Pritchett*, 98 Ala. 649, 13 South. 569, the judgment was reversed for the admission of incompetent evidence which, though directed to the same ultimate issue in the cause, was not directly and strictly in rebuttal of the incompetent evidence admitted without objection on behalf of the opposing party.

(4) One of the bank's books of entry was put in evidence by the defendant without objection from the plaintiff. This book showed no entry of the deposit which plaintiff claimed had been made to his credit. The bank offered this evidence, we take it, in connection with the presumed regularity and completeness of its book as showing a history of all its transactions. The entries in this book were made by Moses, and it may be conceived that this absence of an entry, in connection with plaintiff's evidence tending to show the fact of a deposit, irregularities in the bank's books of account, the subsequent discovery of a large "shortage" in Moses' accounts, the closing of the bank so far as the taking of deposits was concerned, and the suicide of Moses about that time, all which facts were supported by competent evidence—in these circumstances it may be conceived that the absence of an entry tended to support a theory on behalf of plaintiff to the effect that Moses, while receiving the money for the bank in the ostensibly regular course of its business, converted it to his own use. At any rate, plaintiff did not object to the book. And what else the court allowed to go to the jury in support of this theory, to-wit, evidence tending to prove the alleged facts noted above, was properly allowed; its weight and effect being a matter for the jury.

[Morrison, et al. v. Clark.]

(5) Our opinion is that the witness White, who was evidently in a position to know, was properly allowed to testify that, since the time of the alleged deposit and before this suit was commenced, the bank had ceased to do business as a going concern. This, we think, was a collective fact to which the witness might testify in the terms used by him. If the defendant controverted the fact and desired to know on what the witness based his shorthand rendition of the constituent facts implied, it should have drawn out the details on cross-examination.

We are entirely clear to the conclusion that the question put in issue by the complaint and the general denial was one for jury decision. But for the error pointed out the judgment must be reversed, and the cause remanded for another trial.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

Morrison, et al. v. Clark.

Automobile Accident.

(Decided May 18, 1916. Rehearing denied June 30, 1916.
72 South. 305.)

1. **Master and Servant; Injury to Third Person; Complaint.**—Where the action was for personal injury caused by an automobile collision, a count alleging a willful and intentional injury inflicted by defendant's servant or agent, but which failed to charge that such servant or agent having charge or control of defendant's car at the time of the injury was acting within the scope of his employment by defendant, was subject to demurrer.

2. **Appeal and Error; Harmless Error; Pleading.**—Where it was clear from the evidence that the verdict was rendered on the first count charging simple negligence, and that punitive damages were not awarded, any error in overruling a demurrer to the willful and wanton count in the complaint was rendered harmless.

3. **Same; Objection Below; Variance.**—Under rule 34, Circuit Court Practice, the court will not be put in error for admitting evidence that defendant's agent or servant did the act of negligence, where there was no objection at the trial to the evidence on the grounds of variance, although there was a count in the complaint charging that defendant negligently caused or allowed the injury.

4. **Master and Servant; Injury to Third Person; Variance.**—Under a count alleging that defendant negligently caused or allowed his automobile to run against plaintiff's vehicle, plaintiff could recover on evidence which

[Morrison, et al. v. Clark.]

warranted the jury in drawing the inference that the wrongful act was committed by defendant, acting through servants or agents who were at the time acting in the line and scope of their employment.

5. Charge of Court; Directing Verdict.—Where, there was evidence which tended to establish plaintiff's case, the court was without power to withdraw the case from the jury.

6. Motor Vehicles; Use of Streets; Duty of Driver.—Although a driver may use any part of the highway, except under special circumstances, yet when meeting another vehicle or person, whether the vehicle be motor driven or horse drawn, the driver must turn seasonably to the right of the center of the traveled portion of the highway.

7. Same; Presumption.—Each driver of a vehicle on a highway has the right to assume that the other will obey the rule of the road in meeting and passing.

8. Same; Evidence.—Where a collision occurs in meeting with one driving on the left side of the highway, the fact that the other was driving on the wrong side of the highway is only prima facie evidence of negligence, which may be explained or justified as the particular circumstances or exigencies of the cause may warrant.

9. Same.—The fact that one was driving on the proper side of the road when the collision occurred, is evidence of due care.

10. Same; Proximate Cause.—The driver of a vehicle driving on the wrong side of a highway is not liable for injuries sustained by another in collision with his conveyance unless the negligent act of driving on the wrong side was the proximate cause of the injury, as there must be a causal connection between the unlawful and wrongful act of driving on the wrong side, and the resulting injury.

11. Same; Statute.—Under Acts 1911, p. 642, § 20, where the automobile driven by defendant's son was approaching from the rear of plaintiff, and was attempting to pass when the collision occurred, it was the duty of those in charge of the automobile to have the same under control, and not to pass until the right of way for free passage had been accorded them by plaintiff, as soon as practicable, or existed by the circumstances.

12. Same; Contributory Negligence.—If plaintiff negligently pulled his horse suddenly to the left without notice or warning to the driver of the automobile, while the automobile was so close that its driver did not have a reasonable opportunity to avoid the collision, there could be no recovery for the injuries caused by defendant's automobile.

13. Same; Instruction.—A charge asserting that the law of the road requires a person driving along a public street or highway to keep to the right, and if the jury found that plaintiff was not as near the right side of the street or highway, where the injury occurred, at the time of the injury, and that this was the proximate cause of the injury, then you cannot find for plaintiff under the negligent count, was properly refused.

14. Charge of Court; Mind of Juror.—The fact that the mind of any one juror was in a state of doubt or uncertainty, might warrant a mistrial, but would not warrant a verdict for defendant.

15. Husband and Wife; Action by Husband; Loss of Service.—A husband may recover for the loss of the services of his wife where such loss proximately resulted from injuries wrongfully inflicted upon her.

[Morrison, et al. v. Clark.]

16. **Motor Vehicles; Use of Street; Jury Question.**—Under the evidence in this case it was a question for the jury whether defendant's son who was driving the automobile had proper control or charge of the automobile when the injuries were inflicted.

17. **Master and Servant; Injuries to Third Person; Instruction.**—Where defendant's agent, within the scope of his employment, had the right to use the automobile at the time of the accident, charges to find for defendant, if at the time of the accident, defendant had no desire for the agent to take the automobile out and run it on the occasion when the injuries were inflicted; or if at the time of the accident, the agent was running it without regard to defendant's wishes or desires, were misleading in the use of the word "wishes" or "desires" and "desire," as it was not a question as to the wish or desire of the master, but of the authority of the servant or agent in charge just before and at the time of the collision to have and operate the car.

APPEAL from Birmingham City Court.

Heard before Hon. A. H. ALSTON.

Action by G. W. Clark against John M. Morrison and others, for damages for injuries in an automobile collision. Judgment for plaintiff and defendants appeal. Transferred from the Court of Appeals under section 6, Act April 18, 1911, p. 450. Affirmed.

The pleadings and the facts sufficiently appear. The following charges are referred to in the opinion:

8. (Given for defendant.) The court charges the jury that if they believe from the evidence that the plaintiff negligently pulled his horse suddenly to the left without notice or warning to the driver of the automobile, while said automobile was so close to the buggy as not to admit of a change in direction by the driver of the automobile, and without reasonable opportunity upon the part of the driver of the automobile to avoid the collision, then you cannot find for plaintiff under the first count.

The following charges were refused to defendant:

16. I charge you that the law of the road requires a person driving along a public street or highway to keep to the right, and if you find that plaintiff was not as near the right side of the street or highway where the injury occurred at the time of the injury, and that this was the proximate cause of the injury, then you cannot find a verdict in favor of the plaintiff under the first count of the complaint.

11. The court charges you that if after a fair consideration of the evidence the mind of any one of you is left in a state of uncertainty and doubt so that you cannot reasonably decide whether defendant was guilty of the wrong charged in any count of the complaint, then your verdict must be for defendant.

[Morrison, et al. v. Clark.]

4. If you believe the evidence in this case, you cannot find for plaintiff as to any alleged loss of service of his wife, claimed to have been sustained by the plaintiff.

D. The court charges you that you cannot return a verdict in favor of plaintiff unless you find from the evidence that Gayhart was in charge of the automobile when the alleged injuries were sustained.

B. The court charges you, gentlemen, that if from the evidence you find the defendant had no desire for Truman Morrison and Gayhart to take out his automobile and run it on the occasion when the said injuries were inflicted, then your verdict should be for defendant.

E. Your verdict cannot be for plaintiff if you believe from the evidence that at the time of the alleged accident Gayhart and Truman Morrison were running the defendant's automobile without regard to the defendant's wishes or desires whether they should run it or not.

ALLEN, FISK & TOWNSEND, for appellant. HARSH & HARSH, and R. B. KELLY, for appellee.

THOMAS, J.—The case was tried on a simple negligence count, charging that: "While plaintiff and his wife, Sarah E. Clark, were in a vehicle, to-wit, a buggy, upon a public highway in the city of Birmingham, Ala., an automobile being operated by defendant ran into, upon, or against said vehicle in which plaintiff and his said wife were, and as a proximate consequence thereof, etc. * * * Plaintiff alleges that said automobile ran upon or against or into said vehicle in which plaintiff was on the occasion aforesaid, and plaintiff suffered the personal injuries and damages to himself and damages and loss to his said property, and the consequent damages and loss to him from the said injuries and damages to his said wife, all as a proximate consequence of the negligence of defendant, in this, to-wit, defendant negligently caused, or allowed said automobile to run upon or against or into said vehicle on the occasion aforesaid."

(1) The second count, charging a willful and intentional injury inflicted by the defendant's servant or agent, failed to aver that such servant or agent of the defendant, having charge or control of said car at the time of the infliction of the injury, was acting within the line and scope of his employment by the

[Morrison, et al. v. Clark.]

defendants. This defect was taken by demurrer that should have been sustained.—*Addington v. Amer. Casting Co.*, 186 Ala. 92, 64 South. 614; *Wise, Adm'r, v. Curl, et al.*, 177 Ala. 324, 58 South. 286; *Daniels v. Carney*, 148 Ala. 81, 86, 42 South. 452, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 34, 12 Ann. Cas. 612; *Ala. Gt. Sou. R. R. Co. v. Pouncey*, 7 Ala. App. 548, 61 South. 601.

(2) It is clear that the question whether the agent or servant in charge of the car at the time of the infliction of said injury was acting within the line and scope of his employment was correctly submitted for the decision of the jury. From the undisputed evidence it is likewise clear that the jury found for the defendant under the second count of the complaint, and that punitive damages were not awarded.

The evidence shows that by reason of the collision the plaintiff sustained the loss of \$110 on his horse, \$2 or \$3 damage to the harness, \$20 damages for the buggy that was destroyed, incurred a medical bill of \$100 or more, and sustained loss of time from his labor, where he was earning \$100 a month before the accident, or the value of his services in nursing his wife, on account of her injuries caused by the collision, for the period of about three months. Thus it is clear, that the verdict for \$250 was on the first count, for the actual damages of the plaintiff sustained and claimed, and not on the second count, for punitive or exemplary damages. We are of opinion, from the entire record, that the defendant was not injuriously affected in his substantial rights by the ruling on demurrer and the refusal to give charge No. 2.

(3) Adverting to the first count, in which is the averment that the "defendant negligently caused or allowed said automobile to run upon or against or into said vehicle on the occasion aforesaid," in *City Del. Co. v. Henry*, 139 Ala. 161, 34 South. 389, this court held that as to simple negligence, an averment that the "defendant" did the wrongful act could be maintained by proof that defendant's servants or agents did the act of negligence, while acting within the line and scope of their employment by the defendant.—31 Cyc. 1626. Moreover, there was no objection to the evidence on the ground of a variance; therefore the court could not be put in error.—Circuit court rule No. 34, 175 Ala. xxi.

(4) If, then, there was evidence to warrant the jury in drawing the inference that the wrongful act was committed by the

[Morrison, et al. v. Clark.]

defendant acting through servants or agents who, at the time, were in the discharge of the master's business, and were acting within the scope of the employment, then the affirmative charges requested by the defendant, as A and 1, were properly refused.

(5) When there is evidence which tends to establish the plaintiff's case, the court should not withdraw the cause from the jury.—*Tobler v. Pioneer Mining & Mfg. Co.*, 166 Ala. 517, 52 South. 86; *McCormack v. Lowe*, 151 Ala. 313, 44 South. 47; *M., J. & K. C. R. R. Co. v. Bromberg*, 141 Ala. 258, 37 South. 395; *Shipp v. Shelton*, 193 Ala. 658, 69 South. 102; *Amerson v. C. C. & I. Co.*, 194 Ala. 175, 69 South. 601; *Holmes v. Bloch*, *infra*, 71 South. 670; *L. & N. R. R. Co. v. Jenkins*, *infra*, 72 South. 68. An examination of the evidence shows that this question of fact was properly submitted to the jury.

The tendency of the evidence in the case at bar is more nearly analogous to that in *Levine v. Ferlisi*, 192 Ala. 362, 68 South. 269, being different from that in the case of *Parker v. Wilson*, 179 Ala. 361, 69 South. 150, 43 L. R. A. (N. S.) 87, and *Armstrong v. Sellers*, 182 Ala. 582, 62 South. 28.

Observance of the rule of the road is becoming more important, with the increasing use of steam, electric, and motor power vehicles on the public highways.—*Berry on Automobile Law*, § 119; *Parker v. Wilson*, *supra*; Gen. Acts 1911, pp. 640-642. In *Sherman & Redfield on the Law of Negligence*, vol. 3 (6th Ed.) § 649, it is said: "It is a universal custom under law in America for travelers, vehicles, and animals under the charge of man, to take the right hand of the road when meeting each other, if it is reasonable practicable to do so; and this rule, meaning that one should seasonably take the right hand, is enforced by statute in many states, so far as it relates to travelers in vehicles or on horseback. The statutes upon this subject generally prescribe that travelers shall pass to the right of the 'center of the road.' This means the center of the lawfully worked part of the road. No one is bound to leave that part of the road while there is room for other travelers to pass upon it, even though the smooth part be entirely on one side of the road."

(6, 7) It is generally accepted that vehicles, whether automobiles, horse-drawn conveyances, or bicycles, when meeting on the highways, must turn seasonably to the right of the center of the traveled portion of the highway in order to give each other room to pass.—*Slaughter v. Goldberg, et al.*, 26 Cal. App. 317,

[Morrison, et al. v. Clark.]

147 Pac. 90. A driver may use any part of the highway except under special circumstances, and when meeting another vehicle or a person. At the time of such meeting and passing, the duty of each to the other is to keep to the right.—*Giles v. Ternes*, 93 Kan. 140, 145, 143 Pac. 491; *Ternes v. Giles*, 93 Kan. 435, 144 Pac. 1014; *Segerstrom v. Lawrence*, 64 Wash. 245, 247, 116 Pac. 876. Each has a right to presume that the other will obey the rule of the road in meeting and passing.—*Medlin v. Spazier*, 23 Cal. App. 243, 137 Pac. 1078; 29 Cyc. 516.

(8) Where, however, a collision occurs in such passing on the highway, the presence of one on the left side of the road may be explained or justified as the particular circumstances or exigencies of the case may warrant.—*Johnson v. Small*, 5 B. Mon. (Ky.) 25; 3 Shearman & Redfield on Neg. § 649; Elliott on Roads and Streets, 620; *Clay v. Wood*, 5 Esp. 44; *Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 231; *Slaughter v. Goldberg, et al.*, *supra*; *Riepe v. Elting*, 89 Iowa, 82, 89, 56 N. W. 285, 26 L. R. A. 769, 48 Am. St. Rep. 356; *Wrinn v. Jones*, 111 Mass. 360; *Hubbard v. Bartholomew*, 163 Iowa, 58, 144 N. W. 13, 49 L. R. A. (N. S. 443; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Giles v. Ternes*, *supra*.

When, however, the collision occurs in meeting with one driving on the left side of the highway, the being on the wrong side of the highway amounts only to prima facie evidence of negligence.—*Riepe v. Elting*, *supra*; *Segerstrom v. Lawrence*, *supra*; *Herdman v. Zwart*, *supra*; *Cook v. Fogarty*, 103 Iowa 504, 72 N. W. 677, 39 L. R. A. 488; *Hubbard v. Bartholomew*, *supra*.

(9) It is, likewise, evidence of due care that one was driving on the proper side of the road when the collision occurred.—*Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701.

(10) But the driver of a vehicle proceeding on the "wrong side" of the highway is not liable for injury sustained by another in collision with his conveyance, unless the negligent act of driving on the wrong side was the proximate cause of the injury. There must be causal connection between the unlawful or wrongful act of driving on the left side, and the resulting injury.—*Herdman v. Zwart*, *supra*; *Giles v. Ternes*, *supra*.

The courts have declared that where driving on the left side of the highway is the violation of an ordinance or a statute, such driver's rights are inferior to the rights of travelers going in

[Morrison, et al. v. Clark.]

the opposite direction (*Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461; *Hubbard v. Bartholomew*, *supra*); that statutes and ordinances, requiring travelers meeting on the highway to turn to the right, are to be interpreted as meaning that they shall do so seasonably, so that neither shall be impeded or retarded in the progress by reason of the other's occupying more than his portion of the road (Gen. Acts 1911, p. 642; *Segerstrom v. Lawrence*, *supra*); and that statutes and ordinances regulating the conduct of drivers in overtaking and passing other vehicles on the highway are inapplicable to vehicles meeting and passing on the highway (*Zellmer v. McTague*, 170 Iowa, 534, 153 N. W. 77). The rule of the road finds statement in our statute as follows:

"Whenever a person operating a motor vehicle shall meet on a public highway any other person riding or driving a horse or horses or other draft animals or any other vehicle, the person so operating such motor vehicle shall seasonably turn the same to the right of the center of such highway so as to pass without interference. Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal or other vehicle pass on the left side thereof and the rider or driver of such horse, draft animal or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any such person so operating a motor vehicle shall, at the intersection of public highway keep to the right of the intersection of the center of such highway when turning to the right and pass to the right of such intersection when turning to the left."—Acts 1911, p. 642, § 20.

(11) The car driven by defendant's son was approaching from the rear of plaintiff and attempting to pass, when the collision occurred. The duty was upon those in charge of the automobile, approaching and attempting to pass the vehicle, to have the car under such control as not to collide with plaintiff's vehicle, as they undertook to pass on the left side thereof. They were likewise under the duty not to undertake to pass until the right of way for free passage had been accorded by the driver of the vehicle ahead, or actually existed by the circumstances of the place. The statute places the duty on the first rider or driver to turn to the right so as to allow free passage on the left, only after notice and "as soon as practicable" according to the reasonable appearance of the situation.—*Overton v. Bush*, 2 Ala. App. 623, 56 South. 852.

[Morrison, et al. v. Clark.]

(12, 13) The jury were properly instructed in charge 8, and no error was committed in refusing charge 16, requested by the defendants.

(14) By charge No. 11, defendants sought to have the jury instructed to find for the defendants, if the mind of any one juror was in a state of doubt or uncertainty. This fact might have warranted a mistrial, but not a verdict for the defendants.—*Hale v. State*, 122 Ala. 85, 26 South. 236; *Goldsmith v. State*, 105 Ala. 8, 16 South. 933; *Pickens v. State*, 115 Ala. 42, 22 South. 551; *B. R. L. & P. Co. v. Humphries*, 171 Ala. 291, 54 South. 613; *Carter, et al. v. State*, 103 Ala. 93, 15 South. 893; *Cunningham v. State*, 117 Ala. 59, 23 South. 693; *A. G. S. R. R. Co. v. McWhorter*, 156 Ala. 269, 47 South. 84.

(15) The husband may recover for loss of the services of his wife (*So. Ry. Co. v. Crowder*, 135 Ala. 417, 33 South. 335; *Ala. City, etc., Co. v. Appleton*, 171 Ala. 324, 54 South. 638, Ann. Cas. 1913A, 1181), for expenses incurred in the procurement of such medical or surgical skill as ordinary prudence would suggest to be necessary in the treatment of her injuries (*B. R. L. & P. Co. v. Anderson*, 163 Ala. 72, 50 South. 1021; *Ala. City, etc., Co. v. Appleton, supra*), and for the value of his services while nursing his wife (*B. R. L. & P. Co. v. Chastain*, 158 Ala. 421, 48 South. 85; *So. Ry. Co. v. Crowder, supra*; *Bryan v. Stewart*, 194 Ala. 353, 70 South. 123), where such damages proximately result from injuries wrongfully inflicted upon her..

Charge No. 4, requested by defendants, was properly refused.

(16) Whether Truman Morrison had the rightful control or charge of the automobile when the alleged injuries were inflicted was properly submitted to the jury; and no error was committed by the refusal of charge D, requested by the defendants.

(17) If Morrison or Gayhart, within the line and scope of the employment by the defendants, had the right to take and to use the automobile on the occasion of the accident, as it was used, then charge B and E, requested by defendants, were misleading in the use of the words "desire," and "wishes or desire." Moreover, the law on this phase of the defendant's evidence was given the jury in charges C, 9, 13, 14. It was not a question of the wish or desire of the master but of the authority of the servant or agent in charge just before, and at the time of the collision, to have and operate the car.

The case is affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

[Lamb, Receiver, v. Roberts.]

Lamb, Receiver, v. Roberts.

Maintaining Nuisance.

(Decided May 18, 1916. Rehearing denied June 30, 1916.
72 South. 309.)

1. **Railroads; Receivers; Nuisance; Knowledge.**—Where the receiver of a railroad had not created a nuisance, an action could not be maintained against him for maintaining the nuisance, unless he had notice or knowledge of the hurtful tendency of the nuisance, or had been requested to abate it, the same being a mere nonfeasance.

2. **Nuisances; Creation.**—One who erects or creates a nuisance is liable for its continuation if he has actual notice or knowledge of its hurtful tendency, even after he has parted with title and possession of the property; his grantee or licensee becomes liable only when they continue the nuisance after knowledge of its hurtful tendency, or notice or request to move it.

3. **Appeal and Error; Harmless Error; Pleading.**—Where the action was against a receiver of a railroad for maintaining a nuisance, the overruling of a demurrer to the complaint, the ground alleged being that it failed to allege that defendant had any notice or knowledge of the nuisance complained of, or had been requested to abate it, was not harmless error, since the ruling was to the effect that the scienter need not be proven, and that defendant would not be allowed to disprove it.

APPEAL from Clay County Court.

Heard before Hon. E. J. GARRISON.

Action by Mrs. M. L. Roberts against E. T. Lamb, as receiver of the Atlanta, Birmingham & Atlantic Railroad Company, for damages for maintaining a nuisance. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Transferred from the Court of Appeals.

MERRILL & CORNELIUS, for appellant. RIDDLE, BURT & RIDDLE, for appellee.

MAYFIELD, J.—The action is to recover damages for the maintaining of a nuisance. The amended complaint consisted of but one count, which declared as for maintaining a nuisance, and not for creating it. The original complaint declared for creating, as well as maintaining; and the amendment was evidently made to meet the evidence because the undisputed evidence showed that the only nuisance complained of, if such it was, was created many years prior to the defendant's connection or relation, as

[Lamb, Receiver, v. Roberts.]

receiver, with the defendant road, and was created by a predecessor in title to the railroad company of which defendant was receiver. Plaintiff's own evidence showed that the nuisance of which complaint is made was created in the year 1901, 1902, or 1903, when the railroad was being constructed by the Eastern Railway of Alabama, a predecessor in title even to the Atlanta, Birmingham & Atlantic Railroad Company, of which the defendant is receiver. The amended complaint declares solely as for the maintenance of a nuisance by the receiver from December 17, 1913, to December 17, 1914. The actionable wrong alleged is as follows: "Plaintiff further avers that she suffered said injuries and consequent damages as a proximate consequence of the defendant's wrongs in this, the defendant as such receiver wrongfully maintained said pool of water in the condition the same was in, as aforesaid, during the time complained of."

The amended complaint was demurred to on the ground, among many others, that the complaint failed to allege that defendant had any notice or knowledge of the nuisance complained of, being so maintained by him as such receiver, or that he had notice or knowledge of the hurtful tendency of the nuisance, or that any request or demand had ever been made on the defendant to abate the nuisance.

(1) The trial court overruled the demurrer, thereby holding that no allegation of scienter was necessary to support the action as for maintaining the nuisance. In this ruling the trial court was in error. In the case of *Crommelin v. Coxe*, 30 Ala. 318, s. c., 68 Am. Dec. 120, a complaint similar to this was tested by demurrer; and the trial court in that case, as in this, held the count complained of sufficient, but on appeal the case was reversed, and the court, speaking through STONE, J., said: "The second ground of demurrer is well taken. For continuing a nuisance by omitting to reform it, a mere nonfeasance, where the continuance implies no action, we are satisfied no action can be maintained, unless the party owning the property have notice or knowledge of the hurtful tendency of the nuisance, or be requested to abate it. —*Penruddock's Case*, Coke's Rep. 5th part, page 101; *Beswick v. Cumden*, Cro. Eliz. 520; *Pierson v. Glean*, 14 N. J. Law, 36 [25 Am. Dec. 497]; *Loftin v. McLemore*, 1 Stew. 133."

(2) This case followed an older case cited above in 1 Stew. 133, and from it there has never been any departure. In fact, as is pointed out by Mr. Freeman, in his note to *Leahan v. Cochran*,

[Lamb, Receiver, v. Roberts.]

178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, reported in 86 Am. St. Rep. 506, there is at present but one court—that of Michigan—which holds that an allegation of scienter is unnecessary in a complaint for maintaining a private nuisance, as distinguished from creating, or creating and maintaining. As pointed out by Mr. Freeman in the note above mentioned, the Michigan case seems to stand alone, since the New York decisions were departed from by that court. While the argument in the Michigan case (*Caldwell v. Gale*, 11 Mich. 77) and in the earlier but overruled New York cases is not, at first glance, without force, yet as has been since pointed out by annotators, text-writers, and some opinions, the fallacy of those decisions was in grounding or basing the liability as for a nuisance upon the ownership or control of the premises on which the nuisance is located or situated, instead of upon some wrongful act in creating or continuing it with knowledge of its hurtful tendencies. One who erects or creates a nuisance is liable for its continuance, with actual knowledge or notice of its hurtful tendencies, even after he has parted with the title and possession. He is the author of the original wrong, and in parting with the premises with the wrong still existing, he is treated as affirming the continuance of it. Note to 86 Am. St. Rep. 510, and cases cited. The rule is thus stated in this note: "One who creates a nuisance on his own land cannot escape responsibility for it by conveying or letting the property to another. And his grantee or his lessee does not become liable for the nuisance merely by suffering it to remain. Though they own or occupy the premises, they become liable for the nuisance only when they continue it after knowledge of its hurtful tendencies, or after notice or request to remove it.—*Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, 201, 38 Atl. 631; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702."

The real basis of the liability for consequences flowing from the maintenance of a nuisance by the receiver from December 17, does not depend upon the ownership or possession of the premises in which it is located. It is the wrongful act of creating it, with or without knowledge or notice of its injurious tendencies, which fixes liability. The rule on the subject has been well stated by Mr. Joyce, in his recent work on Nuisances, in line with the

[Lamb, Receiver, v. Roberts.]

decisions of this and other courts. He says: "It is not necessary that notice be given to the erector or creator of a nuisance, or that he be requested to abate the same before action is brought, although it is held that, except in cases of nuisances per se, a nuisance cannot be summarily abated by a municipality except upon notice and an opportunity to be heard. * * *"—Section 455.

"A different rule from that which governs notice to an erector of a nuisance prevails, however, as to a subsequent holder by purchase or descent, and where such party did not create an existing nuisance or the source thereof, but it was created prior to the time he acquired his title or interest, notice, or a request or demand to reform, abate, or remove it, must be given him, and it is a prerequisite or condition precedent to maintaining an action against him to abate, or for damages. * * *"—Section 456.

"Although a lessee with actual notice, or other person not the creator of a nuisance, may be liable if he has knowledge of its existence, and continues it, still it is also held that knowledge of the existence of a nuisance is not equivalent to a request to abate. And one's knowledge must be of such a character as to charge him with notice that a nuisance exists. * * *"—Section 457.

In notes to these sections will be found many cases on the subject.

(3) The overruling of the demurrer to the complaint cannot be said to have been error without injury. Such ruling was to hold that notice or knowledge of the nuisance or of its hurtful tendencies was not a fact in issue, that the scienter need not be proven, and that defendant would not be allowed to disprove it. Proof of a material and necessary fact to support an action without an allegation of such fact, is as impotent as the allegation thereof, without proof. In 4 Campb. 198, Lord Ellenborough directed a nonsuit, because the evidence was not sufficient to warrant the jury in inferring that the defendant knew the dog was accustomed to bite. In a like case, Lord Abinger nonsuited because it did not appear that the owner had knowledge of the vicious propensity of his dog.—7 Car. & P. 755. In 3 Salk. 12, the reporter says: "The plaintiff declared that the defendant kept a bull, which used to run at men, but did not say *sciens* or *scienter*; and this was adjudged ill after a verdict, because the

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

action will not lie unless the owner knew the quality of his bull, and it cannot be intended that this was proved at the trial, because the plaintiff is not bound to prove more than is laid in his declaration."—*State v. Donohue*, 49 N. J. Law, 550, 10 Atl. 150, 60 Am. Rep. 652.—7 Mayf. Dig. 700.

It is unnecessary to treat the other assignments insisted upon, as the question may not arise on another trial.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

Alabama Great Southern Railroad Co. v. Loveman Compress Co.

Setting Out Fire.

(Decided May 11, 1916. Rehearing denied June 30, 1916.
72 South. 311.)

1. **Pleading; Demurrer; Verification.**—A plea in abatement when required to be verified under § 5332, Code 1907, is demurrable if not verified, although it was subject to motion to strike on the same ground.

2. **Evidence; Opinion; Value.**—A non expert may give an opinion as to value.

3. **Same; Amount of Insurance.**—Where the action was against a railroad for the destruction of property by fire, it is not proper to permit evidence as to the amount of insurance on the burned property, since it could not properly tend to establish the value of the property.

4. **Corporations; Ultra Vires; Contract Exempting From Liability.**—A contract between a railroad company and a corporation, whereby the railroad company is exempted from negligent fires in consideration of the use of the part of the railroad's right of way in connection with the business of the corporation, is void as ultra vires the corporation if it is not authorized by the charter of the corporation.

5. **Same; Ratification by Stockholders.**—By a ratification thereof the stockholders of a corporation may render binding acts done which are within the powers of the corporation, although ultra vires its officers or a mere majority of the stockholders, but they cannot ratify acts done ultra vires the corporation.

6. **Railroads; Setting Out Fire; Burden of Proof.**—Where the action was against a railroad for negligently setting out fire, and the negligence is alleged generally, proof that the fire was caused by sparks from the railroad locomotive, makes out a prima facie case for the plaintiff.

7. **Same.**—In such an action, such a prima facie case casts the burden on defendant of proving not only the proper equipment and construction of the locomotive, but that it was properly and skillfully operated.

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

8. Same; Jury Question.—In this case, it was for the jury under the evidence to determine the origin of the fire, as well as the sufficiency of the equipment, construction and operation of the locomotive.

9. Same; Instructions.—A charge asserting that the mere fact, if it be a fact, that the property of plaintiff was discovered to be on fire soon after the passing of one of defendant's locomotives, raised no presumption that said fire had originated by sparks escaping from the said engine, is not only argumentative, but ignored other facts tending to show that the engine set out the fire.

10. Same.—A charge asserting that if the jury believe from the evidence that defendant used a spark arrester of an approved pattern in general use, which upon inspection by competent persons at or about the time of the fire mentioned, appeared to be in good condition, and that said engine was run and handled by a competent and skillful engineer, in the ordinary manner of handling such engine, at the time and place when and where such injury occurred, and if you further believe that said fire originated by the sparks escaping through such spark arrester your verdict should be for defendant, etc., was properly refused as omitting mention of the requirement of a properly constructed engine.

11. Charge of Court; Covered by Those Given.—It is not error to refuse charges substantially covered by charges given.

12. Corporations; Ultra Vires; Ratification.—Acts ultra vires the corporation because not authorized by its charter or necessarily incident to its charter powers, cannot be ratified by the stockholders under § 233, Constitution 1901.

APPEAL from Sumter Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Action by the Loveman Compress Company against the Alabama Great Southern Railroad Company, for the destruction of a compress and equipment. Judgment for plaintiff, and defendant appeals. Affirmed.

Count 2 of the complaint is as follows:

Plaintiff claims of defendant the sum of \$15,000 damages for that on, to-wit, the 28th day of January, 1914, the defendant, its servant or agent, while acting within the line or scope of their employment, negligently set fire to and destroyed the following described property. [Here follows a description of the building and machinery which are alleged to have been adjacent to and near defendant's right of way at or near or in the town of Epps, Ala., in Sumter county.] Plaintiff avers that on said date plaintiff was the owner of said property, and was damaged in the amount sued for.

Plea 8 was, in substance, that plaintiff had no interest in the subject-matter of the suit, in that plaintiff had insured the property which was destroyed by fire in an insurance company for

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

\$5,000, and that after the fire and destruction of said compress, damages for which this suit is brought, the insurance company paid to plaintiff the insured value of said compress, and plaintiff accepted from said insurance company said payment in satisfaction of its claim, and has assigned any right of action which it may have had with respect thereto to the insurance company. The indemnity contract referred to sufficiently appears. The following charges were refused to the defendant:

(1) Affirmative charge.

(3) If the jury believe from the evidence that the damage complained of in the complaint was caused by sparks from defendant's engine, run and operated upon its said road, the plaintiff is not entitled to recover if the jury should further believe from the evidence that defendant's engine was equipped with modern and improved spark arresters, such as are used on well-regulated railways.

(5) The evidence is uncontroverted that the engine which it is alleged caused the fire was in good condition at the time of the injury complained of.

(9) Under the evidence in this case, the engine of the plaintiff was properly handled and properly equipped, and plaintiff is not entitled to recover in this instance.

(24) Same as 3, with amplification as to inspection.

(8) The court charges the jury that the mere fact, if it be a fact, that the property of plaintiff was discovered to be on fire soon after the passage of one of defendant's engines raised no presumption that said fire had originated by sparks escaping from said engine.

(12) The court charges the jury that while the law is that, when a fire is proven to have been caused by fire escaping from an engine of the railroad company, the presumption of negligence arises, it is not a rule of liability, but only casts upon the defendant the burden of proof to show that its engine was properly equipped and properly handled, and when the railroad company repels the inference of negligence by proof of the proper construction of its engine, and the use of proper appliances and careful management, the plaintiff cannot recover, unless the plaintiff should reasonably satisfy the jury by the evidence of other negligence or want of care on the part of the railroad company.

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

(4) If the jury believe from the evidence that defendant used a spark arrester of an approved pattern in general use, which, upon inspection, by competent persons at or about the time of the fire mentioned, appeared to be in good condition, and that said engine was run and handled by a competent and skillful engineer in the ordinary manner of handling such engine, at the time and place when and where said injury occurred, and if you should further believe that said fire originated by the sparks escaping through such spark arrester, the defendant is not liable for the injury resulting from such fire, and your verdict should be for defendant.

A. G. & E. D. SMITH, and J. T. STOKELY, for appellant. FOSTER, VERNER & RICE, for appellee.

ANDERSON, C. J.—(1) Defendant's plea 8 is such a plea in abatement as is required to be verified by section 5332 of the Code of 1907, and was demurred to because not verified, and the trial court did not err in sustaining the demurrer. It might be that it could have been stricken on this account, but it could also have been eradicated by a demurrer.—*Moore Bros. v. Cowan*, 173 Ala. 536, 55 South. 903.

(2) The only ground of objection to the evidence of the witness Barnes as to the value of the compress was that "he was not shown to be an expert in the valuation of property of this kind." A nonexpert can give an opinion as to value.—*Southern R. R. v. Morris*, 143 Ala. 628, 51 South. 308; *Vandegrift v. State*, 151 Ala. 105, 43 South. 852.

(3) There was no error in sustaining the plaintiff's objection to the questions to the witness Hester as to the amount of insurance on the compress, as the answer to same could not properly tend to establish the value of said compress.

(4, 5) The defendant set up as a special defense an indemnity against liability for the negligent destruction of the property, arising out of a contract or lease between it and the plaintiff, whereby the defendant was to be held harmless for the things now complained of in consideration of the use of a part of its right of way by the plaintiff in connection with its compress business. The court did not hold that the said indemnity clause was void as being contrary to public policy, but affirmatively eliminated this defense because the same was ultra vires as to

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

the plaintiff corporation. Hence the case of *A. G. S. R. R. Co. v. Demoville*, 167 Ala. 292, 52 South. 406, has no application to the powers of this plaintiff, under its charter, as it deals only with the validity vel non of such contracts with reference to public policy, and, as above stated, the contract in question was not condemned as being violative of public policy, but because ultra vires the plaintiff corporation. The plaintiff's charter was introduced in evidence, and while it gives general powers as to the things therein enumerated, including the right to buy, sell, and hold real estate, and which would include the right to lease the same, there is nothing in the charter expressly or by necessary implication that would authorize it to indemnify the defendant against its negligence and willful and wanton misconduct as provided in the clause of the lease relied upon by the defendant. We therefore think that the trial court properly ruled, in the oral charge and by giving and refusing certain special charges, that the clause in question was not binding upon the plaintiff.—*Steiner & Lobman v. Steiner & Co.*, 120 Ala. 128, 26 South. 494, and cases there cited; *Gulf Yellow Pine Co. v. Chapman & Co.*, 159 Ala. 444, 48 South. 662. It is contended by appellant's counsel that, even if the thing contracted for was ultra vires the corporation, it could have been ratified by the action or acquiescence for several years of the stockholders, and we are cited to the case of *Jordan & Co. v. Collins & Co.*, 107 Ala. 572, 18 South. 137. This contention finds support in an expression in said *Jordan Case*, *supra*, but this expression was pronounced dictum in the well-considered opinion in the *Steiner Case*, *supra*, wherein the true rule was announced, in effect, as follows: The stockholders may, by ratification, render binding acts done which are within the powers of the corporation, but ultra vires its officers, or of a mere majority of its stockholders, but they cannot ratify acts ultra vires the corporation. We do not think that the case of *Morgan v. Donovan*, 58 Ala. 241, supports in point, or by analogy, the charter power of the plaintiff to guarantee the indemnity provided in the lease contract.

(6-8) The fifth proposition, as insisted upon in brief of appellant's counsel, groups defendant's refused charges 1, 3, 5, 9, and 24. We do not think that count 2 of the complaint in the case at bar is similar to count 1, discussed in the opinion in the case of *Tinney v. Central of Ga. R. R. Co.*, 129 Ala. 523, 30 South. 623. There the negligence charged as causing the fire was in the

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

operation of the train, and as the fire may have been caused as a result of the defective equipment or construction of same, proof of the fire by the locomotive did not make out a *prima facie* case under a charge of but one of the alternative causes, for the fire may have resulted from the cause not charged. That is the defect in the equipment or construction. Here count 2 is much broader than the one discussed in the *Tinney Case*. It charges that the servants and agents, etc., "negligently set fire to and destroyed" the property, etc. This count was broad enough to cover a negligent burning, whether resulting from the operation and handling of the locomotive or from a defective construction or equipment of same, and proof that the fire was caused by sparks from said locomotive make out a *prima facie* case for the plaintiff, and cast the burden upon the defendant of overcoming this presumption by proving, not only a proper equipment and construction of the locomotive, but that it was properly and skillfully operated, and it was a question for the jury, both as to the origin of the fire as well as the equipment, construction, and operation of the locomotive. It is sufficient to say that the trial court committed no reversible error in refusing these charges, or any of them. Counsel do not discuss them separately, and we do not therefore deem it necessary to point out the infirmities of each of them separately and severally.

(9) There was no error in refusing charge 8, requested by the defendant. If not otherwise bad, it was argumentative, and ignores other facts tending to show that the train set fire to the compress.—*McCary v. A. G. S. R. R. Co.*, 182 Ala. 597, 62 South. 18. The expression in the case of *Southern R. R. Co. v. Dickens*, 161 Ala. 144, 49 South. 768, somewhat similar to this charge, is no doubt sound, but every expression in an opinion does not mean that it can properly be embodied in a written charge. Moreover, the charge in question pretermits from the facts thereby hypothesized the words "without more," as used in the opinion in the *Dickens Case*, *supra*.

(10, 11) Charge 4, refused defendant, is perhaps subject to several points of criticism, one of which is premitting a properly constructed engine.—*A. G. S. R. R. Co. v. Davenport*, 195 Ala. 368, 70 South. 674. Moreover, the defendant got the full benefit of this charge in its given charge 6. It would seem that a charge quite similar to defendant's refused charge 12 was criticised as argumentative and misleading in the case of *McCary*

[Alabama Great Southern Railroad Co. v. Loveman Compress Co.]

v. A. G. S. R. R. Co., 182 Ala. 597, 68 South. 18. But if this charge is not subject to the same criticism, its refusal cannot reverse this case, for the reason that the defendant got the full benefit of same under its given charge 14.

The judgment of the circuit court is affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

ON REHEARING.

ANDERSON, C. J.—(12) The appellant asks for a reconsideration of the holding in the original opinion that the indemnity contract as set up by the defendant was ultra vires the corporation, and that the same could not be ratified by the plaintiff. We are still of the opinion that the original holding is not only supported by the authorities cited, but also by *So. Mutual Association v. Boyd, et al.*, 145 Ala. 167, 41 South. 164; *Cleveland Chair Co. v. Greenville*, 146 Ala. 559, 41 South. 862, and cases there cited, as well as section 233 of the Constitution of 1901, and which says: "No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation."

This provision of our organic law has been given force and effect in our decisions generally without relaxation, except perhaps, to the extent of upholding acts not only expressly authorized under the charter powers of the corporation, but which may be necessarily incidental for carrying out the objects of their charters. Therefore, unless the act is expressly authorized by the charter or is necessarily incident to the powers for carrying out the objects of the charter, it is ultra vires the corporation.

The appellant recognizes the existence, in this state, of the rule as above declared, but contends that it has been relaxed to some extent by two recent decisions of this court, being *Sales-Davis Co. v. Henderson-Boyd Co.*, 193 Ala. 166, 69 South. 527, and *United States Foundry Co. v. Bailey*, 194 Ala. 261, 69 South. 825. We do not think that the holding in the *Henderson-Boyd Case, supra*, departs from the rule existing in this state, as the opinion recognizes that the contract between the two corporations, in order to be binding, must have been within the charter powers of both. It is true that the opinion quotes from *Cook on Corporations* as to what the rule is, provided the state and stock-

[Oldacre v. State.]

holders and creditors do not object, and which said quotation was inapt and misleading without a notation of the fact that this state does object to such a rule or doctrine under the terms of section 233 of the Constitution and as previously enforced by the decisions of this court.

In the case of *United States Foundry Co. v. Bailey*, *supra*, 69 South. 825, there are expressions in the first part of the opinion which may not state the rule accurately, but we think that the real holding was that the corporation could do things only as authorized by its charter or necessarily incident to its charter powers.

Oldacre v. State.

Murder.

(Decided May 18, 1916. Rehearing denied June 30, 1916.
72 South. 303.)

1. **Homicide; Self Defense.**—The fact that the killing of deceased was made necessary to enable defendant to recover some money which deceased had taken from him, could not justify the killing.

2. **Same; Instructions.**—An instruction on self defense which fails to negative the fault of defendant in the matter, or that defendant used any more force or violence than was necessary to obtain his property from deceased, or to defend himself against deceased, was properly refused.

3. **Same; Provoking Difficulty.**—A defendant cannot justify the killing of another by showing the necessity therefor produced by his own wrongful act.

4. **Same; Retreat.**—The right to kill in self defense does not arise until defendant has offered or attempted to retreat, or to decline the combat if there is open to him a reasonably safe way of retreat, and which will not increase his danger.

5. **Criminal Law; Oral Instructions.**—Where the court had instructed the jury as to each matter requested by defendant in writing, and defendant had not requested fuller or more specific instructions in writing, the refusal of the trial court to give oral instructions requested by defendant is not reviewable.

APPEAL from Morgan Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Levi Oldacre was convicted of murder in the first degree and he appeals. Affirmed.

[Oldacre v. State.]

W. H. LONG, JR., for appellant. W. L. MARTIN, Attorney General, and HARWELL G. DAVIS, Assistant Attorney General, for the State.

MAYFIELD, J.—This is an appeal from a judgment in which the sentence of death is imposed, under an indictment charging murder in the first degree. The record proper has been carefully examined, and we find no error which can work a reversal. The defendant is here represented by counsel, who have filed an elaborate brief, and no point is made as to the sufficiency of the record proper.

No objection appears to have been made as to the venire or any venireman. No objection or exception appears as to any ruling on the evidence. The state's evidence, if believed, was ample to support the verdict rendered. It appears without dispute that the defendant killed the deceased by shooting him with a shotgun, and that death was almost instantaneous. The only defense attempted was self-defense. The evidence tending to support this was that deceased, at the time of the shooting, drew a pistol and was attempting to shoot defendant, and that he did shoot at defendant three or four times, about the time, and immediately after, the defendant fired the fatal shot.

The state's evidence, in rebuttal of this, was to the effect, or tended to show, that the deceased did not attempt to shoot the defendant, that he did not draw or fire the pistol, but that the deceased was killed instantly by the first shot, and therefore could not have fired the pistol after he was shot. The evidence was also without dispute that deceased had taken from the defendant \$2 in money, and that defendant, in consequence thereof, went and got the gun, and returned and demanded his money; that deceased offered to hand defendant the money; that defendant, while holding the gun, ordered the deceased to put the money on the ground; and that deceased then handed the money to a third party, for the defendant, whereupon the defendant fired the fatal shot. The defendant's evidence showed, however, that, just as deceased handed the money to the third party, he drew or attempted to draw the pistol, and that this was before defendant fired. But this was denied by the state's evidence.

The trial court, in its oral charge, instructed the jury, correctly and fully, as to the degrees of homicide and the distinctions between the various degrees. The court also instructed the jury

[Oldacre v. State.]

correctly and fully as to self-defense, except as we shall hereafter notice. The defendant requested the court to give the indicated written charges, and the court refused each. These charges were as follows: "A. I charge you, gentlemen of the jury, if you believe, from the evidence in this case, that Louis Brown forcibly took money from the person of Levi Oldacre, that Oldacre had the right to follow the property, and to use such force as may be necessary to recover it.

"B. I charge you, gentlemen of the jury, if you believe the evidence in the case, and from said evidence that Louis Brown took \$2 forcibly from the person of Levi Oldacre, that Oldacre had a right to demand the return of the said money, and, if Louis Brown acted in a manner that placed the life or limb of the said Oldacre in imminent peril, he had the right to use such force as necessary to protect himself.

"C. I charge you, gentlemen of the jury, that if you believe the evidence in this case, and that from said evidence that defendant's life or limb was in imminent peril at the time he shot Louis Brown, then he was justified in shooting him.

"D. I charge you, gentlemen of the jury (if you believe from the evidence in the case that this defendant did not go out of the house with intent to kill Louis Brown, but killed him after he honestly believed he was in imminent peril as to his life or limb, and that he had reasonable grounds for said belief, then you cannot find him guilty as charged.

"D. I charge you, gentlemen of the jury, if you believe from the evidence in this case, that Louis Brown took money from the person of Levi Oldacre forcibly, that Levi Oldacre had the right to follow the property and to use such force as may be necessary to recover it, and if, while in act of recovering it, he had reasonable grounds to believe, from the conduct of the party taking said property, that his life or limb was in imminent peril. he had the right to shoot in self-defense.

"F. I charge you, gentlemen of the jury, if you believe, from the evidence in this case, that this defendant came out of the house with a shotgun in his hands for the purpose of asking Louis Brown to give him the money he took from him, I charge you he had a right to do it, and the fact that he was forced to kill him, if from the evidence you believe he killed in self-defense. does not preclude him from setting up self-defense."

[Oldacre v. State.]

(1, 2) Each of these charges attempts to state or assert the same or kindred propositions of law relating to the right of one to retake his own property from one who has forcibly taken it from him. Each one is misleading in some of its tendencies. Some of these charges are in part abstract, and nearly all are bad in failing to negative defendant's fault in the matter, or that he used any more force or violence than was necessary to obtain his property, or to defend himself from the assault or attack of deceased. In fact, all the evidence shows, even that of defendant himself, that the killing was not necessary to obtain his money; but, if it had been necessary, merely to obtain the money would not justify the killing of the deceased. The true rule on this subject was well stated by SOMERVILLE, J., after reviewing the authorities, in *Storey's Case*, 71 Ala. 340.

(3) The charges were also properly refused, in so far as they attempted to assert the doctrine of self-defense. It is well and correctly settled that charges in homicide cases, to correctly state the law on this subject, must negative the defendant's fault in provoking or bringing on the fatal difficulty. The defendant is not allowed, under the law, to justify the killing of his fellow-man, by showing therefor a necessity which was produced by his own wrongful act. He cannot, for such purpose, avail himself of a necessity wrongfully brought on or produced.

(4) The charges as to self-defense also ignore the doctrine of retreat as a part of that of self-defense. The right to kill in self-defense does not arise until the defendant has offered or attempted to retreat, or to decline the offered combat, provided, however, there be open to him a reasonably safe mode, and that retreat would not increase his danger. We are not speaking of apparent danger, as distinguished from real, as there is no occasion to discuss that subject. Nor are we speaking with reference to assaults which are manifestly felonious in their purpose and forcible in their nature, such as rape, robbery, etc.

(5) The jury, after remaining out for several hours, reappeared in the courtroom and requested of the trial judge further instructions as to certain legal terms and phrases used in his oral and written charges given, as to the punishment, and also as to self-defense. And the judge did further instruct the jury as to the matters inquired about, and no objection or exception thereto, or to any part thereof, was made or reserved. Counsel for the defendant did then and there orally request the court to

[Oldacre v. State.]

charge or instruct the jury further as to certain phases of self-defense, and the judge declined to further instruct as to such particular phases as requested, and the defendant excepted. Under our statutes requested charges must be in writing, and the refusal of the judge must be indorsed by writing, in order to review such declinations to charge or instruct the jury, as appear in this case. The court, as before shown, had instructed the jury as to each matter requested by the defendant; and if the defendant desired that the instructions should be fuller or more specific, he should accordingly have requested the court in writing.

There was, therefore, no refusal or declination of the trial court to charge the law applicable in this case, which we can review on this appeal, touching the oral requests of the defendant. This record has been carefully examined, and we find no reversible error. The judgment of conviction must therefore be affirmed.

Affirmed. All the justices concur.

MEMORANDA

OF

CASES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME,
WHICH ARE ORDERED NOT TO BE REPORTED
IN FULL.

ALLGOOD, AUDITOR, v. DWIGHT MFG. CO.

(Decided April 20, 1916.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

W. L. MARTIN, Attorney General, and J. P. MUDD, Assistant
Attorney General, for the State. DORTCH, MARTIN & ALLEN, for
appellee.

SOMERVILLE, J.—Affirmed on authority of *Allgood, Auditor,*
v. Sloss-S. S. & I. Co., infra, 71 South. 724.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

ALLGOOD, AUDITOR, v. ALABAMA COMPANY.

(Decided April 20, 1916.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

W. L. MARTIN, Attorney General, and J. P. MUDD, Assistant
Attorney General, for the State. TILLMAN, BRADLEY & MORROW,
for appellee.

SOMERVILLE, J.—Affirmed on authority of *Allgood, Auditor,*
v. Sloss-S. S. & I. Co., infra, 71 South. 724.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

ALLGOOD, AUDITOR, v. STANDARD OIL CO.

(Decided April 20, 1916.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

W. L. MARTIN, Attorney General, and J. P. MUDD, Assistant
Attorney General, for the State. TILLMAN, BRADLEY & MORROW,
for appellee.

SOMERVILLE, J.—Affirmed on authority of *Allgood, Auditor, v. Sloss-S. S. & I. Co., infra*, 71 South. 724.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

ALLGOOD, AUDITOR, v. GRASSELLI CHEMICAL CO.

(Decided April 20, 1916.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

W. L. MARTIN, Attorney General, and J. P. MUDD, Assistant Attorney General, for the State. TILLMAN, BRADLEY & MORROW, for appellee.

SOMERVILLE, J.—Affirmed on authority of *Allgood, Auditor, v. Sloss-S. S. & I. Co., infra*, 71 South. 724.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

ALLGOOD, AUDITOR, v. SEMMET SOLVAY CO.

(Decided April 20, 1916.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

W. L. MARTIN, Attorney General, and J. P. MUDD, Assistant Attorney General, for the State. TILLMAN, BRADLEY & MORROW, for appellee.

SOMERVILLE, J.—Affirmed on authority of *Allgood, Auditor, v. Sloss-S. S. & I. Co., infra*, 71 South. 724.

ANDERSON, C. J., MAYFIELD and THOMAS, JJ., concur.

BIBB v. THE STATE.

(Decided June 8, 1916.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

WARREN S. REESE, for appellant. W. L. MARTIN, Attorney General, for the State.

McCLELLAN, J.—The question of guilt vel non was for the jury, and the court did not err in refusing the general charge. Affirmed.

ANDERSON, C. J., SAYRE and GARDNER, JJ., concur.

**ALABAMA STEEL & WIRE CO. v. BUDWIG & MYERS FIRE
BRICK CO.**

(Decided April 20, 1916.)

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

No counsel marked for appellant. **KERR & HALEY**, for appellee.

Per curiam. Appeal dismissed on motion of appellee.

BIRMINGHAM RAILWAY, LIGHT & POWER CO. v. HARRIS.

(Decided April 6, 1916.)

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

TILLMAN, BRADLEY & MORROW, for appellant. **HARSH, HARSH, & HARSH**, for appellee.

Per curiam. Appeal dismissed by agreement of parties.

**BIRMINGHAM RAILWAY, LIGHT & POWER CO. v. VIN-
ZANT, ET AL.**

(Decided April 18, 1916.)

APPEAL from Birmingham City Court.

Heard before Hon. A. H. ALSTON.

TILLMAN, BRADLEY & MORROW, for appellant. **BEDDOW & OBERDORFER**, for appellee.

Per curiam. Appeal dismissed by agreement of parties.

CONSUMERS COAL & FUEL CO. v. DAVIS, ET AL.

(Decided April 20, 1916.)

APPEAL from Walker Chancery Court.

Heard before Hon. A. H. BENNERS.

No counsel for appellant. **DAVIS & FITE**, for appellee.

Per curiam. Appeal dismissed on motion.

COOK v. LAMB, ET AL.

(Decided April 20, 1916.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROW.

No counsel marked for appellant. **TILLMAN, BRADLEY & MORROW**, and **CHARLES E. RICE**, for appellee.

Per curiam. Appeal dismissed on motion of appellee.

HARDEN v. LOUISVILLE & NASHVILLE R. R. CO.

(Decided April 18, 1916.)

APPEAL from Cullman Circuit Court.

Heard before Hon. R. C. BRICKELL.

No counsel marked for appellant. GEORGE H. PARKER, and
EYSTER & EYSTER, for appellee.

Per curiam. Appeal dismissed on motion of appellee.

MATHIS v. MEADOWS.

(Decided April 20, 1916.)

APPEAL from Russell Chancery Court.

Heard before Hon. W. R. CHAPMAN.

GLENN & DE GRAFFENRIED, for appellant. J. D. NORMAN, for
appellee.

Per curiam. Appeal dismissed for want of prosecution.

**MONTGOMERY LIGHT & WATER POWER CO. v. NEW FAR-
LEY NATIONAL BANK.**

(Decided May 11, 1916.)

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

STEINER, CRUM & WEIL, for appellant. RUSHTON, WILLIAMS
& CRENSHAW, for appellee.

Per curiam. Appeal dismissed by appellant.

RAY v. CARBON HILL BANKING COMPANY.

(Decided April 20, 1916.)

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

No counsel for appellant. BANKHEAD & BANKHEAD, for ap-
pellee.

Per curiam. Appeal dismissed.

SCOTT v. THE STATE.

(Decided April 13, 1916.)

APPEAL from Elmore Circuit Court.

Heard before Hon. W. W. PEARSON.

No counsel for appellant. W. L. MARTIN, Attorney General.
for the State.

Per curiam. Defendant having escaped from custody, the appeal is dismissed.

STATE, EX REL. MELTON v. SLAUGHTER, P. J.

(Decided February 1, 1916. Rehearing denied March 30, 1916.)

APPEAL from Monroe Law and Equity Court.

Heard before Hon. W. G. MCCORVEY.

CHARLES HYBART, for appellant. HARE & JONES, for appellee.

Per curiam. Affirmed on authority of *State, ex rel. Brown v. Slaughter, infra*, 71 South. 416.

EX PARTE PUGH.

(Decided May 18, 1916.)

CERTIORARI to Court of Appeals.

R. H. FRIES, and W. A. JENKINS, for appellant. No counsel marked for appellee.

MAYFIELD, J.—Application by John C. Pugh as Judge to annul or revise an order of the Court of Appeals granting Townley as administrator a mandamus compelling said Judge to reinstate a certain cause upon the docket. See *State, ex rel. Townley v. Pugh, Judge*, 14 Ala. App. 585, 70 South. 973. Writ denied.

ANDERSON, C. J., SOMERVILLE and THOMAS, JJ., concur.

SWEENEY, ET AL. v. SWEENEY, ET AL.

(Decided April 4, 1916.)

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

BOYLES & KOHN, for appellant. No counsel marked for appellee.

Per curiam. Appeal dismissed by appellant.

ALABAMA CITY G. & A. RY. CO. v. CITY OF GADSDEN.

(Decided July 6, 1916.)

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

HOOD & MURPHREE, for appellant. M. C. SIVLEY, and W. J. MARTIN, for appellee.

MAYFIELD, J.—Affirmed on authority of this case as reported in 185 Ala. 263, 64 South. 91.

ANDERSON, C. J., SOMERVILLE and THOMAS, JJ., concur.

**BIRMINGHAM TRUST & SAVINGS CO. v. FREDERICK,
ET AL.**

(Decided June 16, 1916.)

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

TILLMAN, BRADLEY & MORROW, for appellant. FORNEY JOHN-
STON, for appellee.

Per curiam. Appeal dismissed by agreement.

BOX v. THE STATE.

(Decided June 30, 1916.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. A. H. ALSTON.

No counsel for appellant. W. L. MARTIN, Attorney General,
for the State.

SAYRE, J.—No error of record and no bill of exceptions. Af-
firmed.

ANDERSON, C. J., MCCLELLAN and GARDNER, JJ., concur.

EX PARTE BUCKHEIT.

(Decided June 30, 1916.)

CERTIORARI to Court of Appeals.

E. W. GODBEY, for appellant. O. KYLE, for appellee.

Per curiam. Application of G. F. Buckheit for certiorari to
Court of Appeals to review and revise the judgment of said court
in the case of *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511,
71 South. 82. Writ denied.

All the Justices concur.

EX PARTE DANIEL.

(Decided May 18, 1916.)

CERTIORARI to Court of Appeals.

ALLEN, BELL & SADLER, for appellant. W. L. MARTIN, Attor-
ney General, and P. W. TURNER, Assistant Attorney General, for
the State.

THOMAS, J.—Application of W. E. Daniel for certiorari to
Court of Appeals to review and revise the judgment of that court
in the case of *Daniel v. State*, 14 Ala. App. 63, 71 South. 79.
Writ denied.

All the Justices concur.

EX PARTE DUNAWAY.

(Decided May 16, 1916.)

CERTIORARI to Court of Appeals.

O. KYLE, for appellant. TIDWELL & SAMPLE, for appellee.

SOMERVILLE, J.—Application of A. M. Dunaway for certiorari to Court of Appeals to review and revise the judgment of said court in the case of *Dunaway v. Roden*, 14 Ala. App. 501, 71 South. 79. Writ denied.

All the Justices concur.

EX PARTE EVERAGE.

(Decided June 8, 1916.)

CERTIORARI to Court of Appeals.

W. L. PARKS, J. M. PRESTWOOD, for appellant. W. L. MARTIN, Attorney General, for the State.

MCCLELLAN, J.—Application of Cleve Everage for certiorari to Court of Appeals to review and revise the judgment of said court in the case of *Everage v. State*, 14 Ala. App. 106, 71 South. 982. Writ denied.

All the Justices concur.

EX PARTE FOX.

(Decided June 1, 1916.)

ORIGINAL petition in Supreme Court.

SILBERMAN & HOSKINS, for appellant. No counsel for appellee.

Per curiam. Writ denied without prejudice.

EX PARTE FOX.

(Decided June 30, 1916.)

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

SILBERMAN & HOSKINS, for appellant. GIBSON & DAVIS, and ISADORE SHAPIRO, for appellee.

Per curiam. Petition for prohibition denied, and the action of the city court in dismissing the same affirmed.

All the Justices concur, except SAYRE, J., not sitting.

EX PARTE GORMAN, ET AL.

(Decided May 26, 1916.)

ORIGINAL petition in Supreme Court.

W. B. HARRISON, LONDON & FITTS, BROWN, LEEPER & KOENIG,
HAYNES & WALLACE, and BEAVERS & ABERCROMBIE, for appel-
lant. RIDDLE & ELLIS, for appellee.

Per curiam. Petition dismissed by petitioner.

EX PARTE WHITE.

(Decided June 30, 1916.)

CERTIORARI to Court of Appeals.

HALEY & HALEY, JAMES A. MITCHELL, HENRY UPSON SIMS,
G. R. HARSH, CABANISS & BOWIE, and J. P. MUDD, for appellant.
W. K. TERRY, for appellee.

SOMERVILLE, J.—Petition of CHARLES F. WHITE, for certiorari
to Court of Appeals to review and revise the judgment of said
court in the case of *Rogers, Treas., v. White, Sec.*, 14 Ala. App.
482, 70 South. 994. Writ denied.

All the Justices concur.

COLLINS, ET AL. v. BUTLER OIL CO.

(Decided May 18, 1916.)

APPEAL from Marshall Chancery Court.

Heard before Hon. W. H. SIMPSON.

No counsel marked for either party.

Per curiam. Appeal dismissed for want of prosecution.

CRUSEAU v. THE STATE.

(Decided June 8, 1916.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. WM. E. FORT.

No counsel for appellant. W. L. MARTIN, Attorney General,
for the State.

GARDNER, J.—No bill of exceptions, and no error of record.
Affirmed.

ANDERSON, C. J., MCCLELLAN and SAYRE, JJ., concur.

KELLY v. GRAVES.

(Decided May 18, 1916.)

APPEAL from Houston Circuit Court.

Heard before Hon. M. SOLLIE.

B. F. REID, for appellant. E. H. HILL, for appellee.

THOMAS, J.—No error is found. Affirmed.

ANDERSON, C. J., MAYFIELD and SOMERVILLE, JJ., concur.

MCCRORY, ET AL. v. DONALD.

(Decided June 13, 1916.)

APPEAL from Choctaw Circuit Court.

Heard before Hon. THOMAS H. SMITH.

BEN F. ELMORE and W. F. HERBERT, for appellant. T. F. SEALE, and NEVILLE, STONE & CURRY, for appellee.

Per curiam. Appeal dismissed for want of prosecution. See also 192 Ala. 312, 68 South. 306.

NORTON v. HOUSE.

(Decided June 30, 1916.)

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

HARVEY A. EMERSON, for appellant. S. W. TATE, for appellee.

Per curiam. Appeal dismissed by appellant.

PRATER v. STATE.

(Decided June 1, 1916.)

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

No counsel marked for appellant. W. L. MARTIN, Attorney General, for the State.

Per curiam. Appeal dismissed.

SLOSS-SHEFFIELD S. & I. CO. v. MANSELL.

(Decided May 30, 1916.)

APPEAL from Franklin Circuit Court.

Heard before Hon. C. P. ALMON.

No counsel marked for either party.

Per curiam. Appeal dismissed.

STATE, EX REL. ATTORNEY GENERAL v. DANIEL.

(Decided July 6, 1916.)

ORIGINAL proceedings in Supreme Court.

W. L. MARTIN, Attorney General, and P. W. TURNER, Assistant Attorney General, for the State. RUSHTON, WILLIAMS & CRENSHAW, H. A. FERRELL, GLENN & DE GRAFFENRIED, and J. W. KELLY, for appellant.

Per curiam. It is the judgment of the court that said Daniel as Sheriff be impeached and removed from office, and it is so ordered.

SAYRE, J., not sitting.

W. U. TEL. CO. v. S. & N. ALA. RY. CO.

(Decided May 18, 1916. Rehearing denied June 30, 1916.)

APPEAL from Birmingham City Court.

Heard before Hon. JOHN C. PUGH.

ALBERT T. BENEDICT, W. C. FITTS, FORNEY JOHNSTON, RUSHTON, WILLIAMS & CRENSHAW, and GEORGE H. FEARONS, for appellant. TILLMAN, BRADLEY & MORROW, L. C. LEDBETTER, H. L. STONE, GEO. W. JONES, and E. PERRY THOMAS, for appellee.

Per curiam. Affirmed on authority of *L. & N. R. R. Co. v. W. U. T. Co.*, 195 Ala. 124, 71 South. 118.

SUBJECT INDEX

ACCOUNTING.

In particular actions, see that title.

Accounting; Pleading.—A bill for an accounting between a debtor and creditor alleging that respondent's indebtedness to complainant is by a complicated account consisting of numerous items of debit and credit, each month for many years, does not sufficiently allege a complicated account, and is demurrable.—*Reilly v. Woolbert*, 191.

Same; Complicated Mutual Account.—Numerous items of debit and credit extending over a period of years does not constitute a complicated mutual account in such sense as to confer equitable jurisdiction for an accounting between debtor and creditor.—*Ib.* 191.

ACKNOWLEDGMENTS.

See Deeds.

Acknowledgment; Effect; Conclusiveness.—The question of whether an instrument is valid as respects the competency of the officer taking the acknowledgment must be raised by direct proceedings and not by collateral attack.—*Qualls v. Qualls*, 524.

Same.—Where the officer taking the acknowledgment is without jurisdiction, there being no examination of the reputed grantor, and no acknowledgment before the officer, his certificate is void, and may be attacked collaterally.—*Ib.*, 524.

Same.—To give an acknowledging officer jurisdiction of the grantor, the mere casual presence of the grantor and the possession of an instrument purporting to have been signed by such grantor is not sufficient, as there must be a personal acknowledgment in some form.—*Ib.* 524.

Same; Impeachment.—It is not essential to the impeachment of a certificate of acknowledgment for fraud or duress practiced on the grantor, that the certifying officer should have participated therein.—*Ib.* 524.

Same; Evidence.—Where defendant set up a deed executed by the plaintiff to defendant, and claimed by plaintiff to have been forged, no right of bona fide purchaser for value being involved, the testimony of the acknowledging officer that he fixed his seal and certificate in the absence of the reputed grantor, was admissible.—*Ib.* 524.

Acknowledgment; Witnesses.—Where the execution of the mortgage sought to be foreclosed is denied by sworn plea, the affirmative testimony of interested witnesses as to the falsity of the officer's certificate of acknowledgment will be scrutinized carefully in the light of their interest, but will be given the same weight as the testimony of other interested witnesses, if full and direct.—*Sulzby v. Palmer*, 645.

ACTIONS.

Actions; Common Count; Waiving Tort.—The sale of an automobile by the purchaser without the consent of the seller, title having been retained by the seller, was a conversion of the property by the party who sold it, and the seller could maintain trover, or could waive the tort, and recover upon the common count after the disposition of the property for money or other property.—*Finney v. Studebaker Cor.*, 422.

ACTS CITED OR CONSTRUED.

General.

- 1907 p. 455. Allgood v. Sloss-S. S. & I. Co., 500.
 1909 p. 14. Sulzby v. Palmer, 645.
 1909 p. 141. Hall, et al. v. First Bank, 627.
 1909 p. 166. Allgood v. Sloss-S. S. & I. Co., 500.
 1909 p. 174. Ward v. Markstein, 209.
 1909 p. 263. Ex parte Hill, 462.
 1911 p. 83. Walker v. Mutual A. T. Co., 154.
 1911 p. 535. Robinson v. Maryland C. & C. Co., 604.
 1911 p. 589. City of Birmingham v. Hawkins, 127.
 1911 p. 589. Hall, et al. v. First Bank, 627.
 1911 p. 642. Morrison v. Clark, 670.
 1915 p. 2. Ward v. Markstein, 209.
 1915 p. 238. State, ex rel. Shoemaker v. Davison, 452.
 1915 p. 238. State, ex rel. Newton v. Herring, 455.
 1915 p. 348. State, ex rel. Mims v. Bugg, 460.
 1915 p. 296. Ward v. Markstein, 209.
 1915 p. 489. Allgood v. Sloss-S. S. & I. Co., 500.
 1915 p. 553. Ward v. Markstein, 209.
 1915 p. 573. Ensley M. C. Co. v. O'Rear, 485.
 1915 p. 595. Madison v. The State, 590.
 1915 p. 597. Berthold & J. L. Co. v. Phalin L. Co., 362.
 1915 p. 708. Paitry v. The State, 598.
 1915 p. 815. Capital Sec. Co. v. Owen, 385.
 1915 p. 815. Reynolds v. The State, 586.
 1915 p. 824. Hackett v. Cash, 403.
 1915 p. 824. Finney v. Studebaker Cor., 422.
 1915 p. 859. Ex parte Hill, 462.

Local.

- 1898-9 p. 1415. Ward v. Markstein, 209.
 1907 p. 203. Wallace v. Cook Brew. Co., 245.
 1911 p. 91. Ray v. Collins, 478.
 1915 p. 20. Dawson v. The State, 593.
 1915 p. 60. Dawson v. The State, 593.
 1915 p. 98. State, ex rel. Knox v. Dillard, 539.
 1915 p. 293. Dunn v. Dean, 486.
 1915 p. 394. State, ex rel. Brown v. Slaughter, 428.

ADVERSE POSSESSION.

Adverse Possession; Evidence.—One claiming by adverse possession cannot introduce letters from the owner merely giving permission to occupy the land when there has been no disavowal of the owner's title.—Lee, et al. v. Lee, 522.

Same; Duration; Tacking.—Possession that was adverse under the statutory provision of the Code of 1896, may be tacked to a possession adverse under the Code of 1907.—Ib. 522.

Same.—If defendant's possession was adverse during and under the period covered by the Code of 1907, and had no adverse possession under the Code of 1896, the two could not be tacked to make the holding complete.—Ib. 522.

Same; Hostile Character; Co-Tenancy.—Possession of land by the son of a deceased owner is presumably for the benefit of the estate and the co-heirs, and is not adverse to them until some hostile act occurs.—Ib. 522.

ALIMONY.

See Divorce.

AMENDMENTS.

See Equity, § 1-(f); Notice; Pleading, § 6.

ANIMALS.

1. Killing.

Animals; Killing; Responsibility.—It is a question of fact for the jury whether there is an apparent necessity for killing an animal to protect human beings or property which the animal is attacking.—*Kershaw v. McKown*, 123.

Same.—Where the action was for killing a dog, a charge asserting that if the dog was not worth greatly more than the goat it was attacking, and if the dog was acting in a way that would lead a reasonably prudent man to conclude that it was necessary to kill the dog to save the life of the goat, or to save it from great bodily harm, the verdict should be for defendant, was not error.—*Ib.* 123.

Same.—In such an action the court properly refused to charge that if the goat which was being attacked was of less value than that of the dog, or the value of the two was not greatly disproportionate, the verdict should be for the plaintiff for the value of the dog killed, and that if defendant could have given the dog away and thus have saved the goat from harm or death, he had no right to kill the dog.—*Ib.* 123.

APPEAL AND ERROR.

1. Harmless Error.

(a) Evidence.

Appeal and Error; Harmless Error; Evidence.—Where it appears that the witness subsequently answered the question, and that the answer was received without objection, any error in refusing to allow such a question to the witness was rendered harmless.—*C. of Ga. Ry. Co. v. Mathis*, 32.

Same.—A carrier cannot complain of the receipt of testimony that the suing passenger did not know, at the time of the injury, what she was talking about, as such testimony tended to support the contention of the carrier that such passenger was drunk.—*Ib.* 32.

Appeal and Error; Harmless Error; Repetition.—Where a witness testified without objection that he had never brought a car down an incline with less than four or five men to let it down, the subsequent allowance of a question by plaintiff to the same witness, eliciting a repetition of that testimony, was harmless to defendant.—*A. G. S. R. R. Co. v. Taylor*, 37.

Appeal and Error; Harmless Error; Evidence.—Where the action was for damages caused by an automobile collision at a street crossing, and defendant had the right of way by ordinance, it was highly prejudicial to exclude a statement by the plaintiff that he could not see or estimate the position of defendant's car on the intersecting street when he first saw defendant, it appearing that plaintiff saw defendant's car 10 or 15 feet before plaintiff reached the intersecting street; such statement being highly relevant to the question of plaintiff's due care in the effort to avoid the collision.—*Ray v. Brannan*, 113.

Appeal and Error; Harmless Error; Evidence.—The exclusion by the court of secondary evidence of the contents of a lost receipt was not error, or if error was harmless, where it appeared that one was received in evidence, and defendant was permitted to testify that some time after the first payment another payment was made which discharged the note sued on, such testimony showing all of the essentials of the receipt.—*Porter, et al. v. Watkins*, 333.

Appeal and Error; Harmless Error; Evidence.—Any error in sustaining plaintiff's objection to defendant's question to a witness as to plaintiff's general character, instead of his character for truth and veracity, plaintiff

APPEAL AND ERROR—Continued.

having testified as a witness, was rendered harmless, where the witness subsequently testified that he did not know plaintiff's reputation, and had not heard it discussed, and that all he knew about it was through personal transactions with plaintiff; reputation being that which people generally in a community say and think of a person, and individual acts and opinions not being material.—*Brown v. Moon*, 391.

Appeal and Error; Harmless Error; Evidence.—Any error in not permitting the question, was harmless where the expected answer thereto was subsequently allowed in evidence.—*Qualls v. Qualls*, 524.

Appeal and Error; Harmless Error; Evidence.—It is harmless error to plaintiff to give for defendant at his request a charge requiring a higher degree of proof from him, than was legally necessary.—*Neeley v. Reynolds*, 581.

(b) Pleading.

Same; Harmless Error; Pleading.—As a defendant may protect himself against injurious results of improper claims for damages by objections to evidence by special charges, and in other ways, error will not be predicated on rulings on motion to exclude such claims.—*Brookside-P. M. Co. v. McAllister, et al.*, 110.

Appeal and Error; Harmless Error; Pleading.—Where matter is available under the general issue, any error in sustaining demurrer to special pleas setting up such matter is harmless.—*Peoples Shoe Co. v. Skally*, 349.

Same.—Where a certain part of a plea is good only in reduction of damages, but is not good as a bar to the action, such matter is available under the plea of general issue, and its elimination from the plea by motion to strike is harmless.—*Ib.* 349.

Same; Striking Plea.—Any error in striking special pleas is rendered harmless where the matters therein contained are available under the general issue.—*Ib.* 349.

Appeal and Error; Harmless Error; Pleading.—Where the broker recovered a verdict which was rested upon the common count, any erroneous ruling as to a count on a written contract was without injury.—*Kellar v. Jones & Weeden*, 417.

Appeal and Error; Harmless Error; Pleading.—The refusal of the trial court to sustain a demurrer to a plea, subject to the demurrer, was harmless where there was a similar plea good as against demurrer, under which the same evidence was admissible, as under the plea retained.—*Martin v. Walker*, 469.

Appeal and Error; Harmless Error; Pleading.—Where it was clear from the evidence that the verdict was rendered on the first count charging simple negligence, and that punitive damages were not awarded, any error in overruling a demurrer to the willful and wanton count in the complaint was rendered harmless.—*Morrison v. Clark*, 670.

Appeal and Error; Harmless Error; Pleading.—Where the action was against a receiver of a railroad for maintaining a nuisance, the overruling of a demurrer to the complaint, the ground alleged being that it failed to allege that defendant had any notice or knowledge of the nuisance complained of, or had been requested to abate it, was not harmless error, since the ruling was to the effect that the scienter need not be proven, and that defendant would not be allowed to disprove it.—*Lamb v. Roberts*, 679.

(c) Instructions.

Appeal and Error; Harmless Error; Instructions.—Where it was claimed that upon the death of plaintiff's father, the land vested in the widow because worth less than \$2,000, and consequently did not descend to

APPEAL AND ERROR—Continued.

plaintiff, error in a charge intended to exclude any exemption to the widow, if the land was worth over \$2,000, the charge basing the value upon the entire tract, and not upon so much of the land as the father might have owned, was harmless; the proof failing to show that whatever land the father got was his exemption at the time of his death, and that he lived on it, or owned less than the exemption so as to vest title in his widow and minor child.—*Landers v. Hayes*, 533.

2. Review.**(a) Scope.**

Appeal and Error; Review; Scope.—Argument on appeal of questions as to the sufficiency of a replication, not raised by the demurrer thereto will not be considered.—*Beatty v. Palmer*, 67.

Appeal and Error; Review; Court of Appeals.—The Supreme Court will not review the findings or conclusions of the Court of Appeals on matters of fact only, nor review such findings nor conclusions to ascertain whether the legal principles applied by that court to the facts should have been applied thereto.—*Ex parte Barrett Bros. S. Co.*, 655.

(b) Waiver.

Appeal and Error; Review; Matters Not Argued.—The court will not consider on appeal questions raised by demurrer in the court below, but not argued or insisted on appeal.—*Beatty v. Palmer*, 67.

Appeal and Error; Insistence Upon.—Assignments of error not insisted upon in brief or oral argument are considered as waived, and will not be treated on appeal.—*Georgia C. Co. v. Lee*, 599.

(c) Presentation Below.

Appeal and Error; Review; Presentation Below.—Whether the matters appear in the pleading or not, advantage may be taken of improper joinder of parties in an action for injuries to their respective persons, on appeal.—*Brookside-P. M. Co. v. McAllister*, 110.

Appeal and Error; Presenting Question in Lower Court; Pleading.—Where, by sustaining demurrers to the cross bill, the court required it to be amended by striking therefrom the portions relating to conveyances of a certain tract, the question of duress in the procurement of the conveyance of such tract cannot be considered on appeal.—*Betts v. Ward*, 248.

Appeal and Error; Review; Matters Urged Below.—An order overruling a general demurrer which did not distinctly point out defects in the complaint will not be reversed on appeal, although such defects are there urged.—*B. R. L. & P. Co. v. Cohill*, 278.

Appeal and Error; Review; Questions Raised Below.—The ruling of the court will not be reviewed where defendant stated no reason for objecting to the exhibition by plaintiff's attorney to plaintiff of his answer to interrogatories.—*Russell v. Bush*, 309.

Same; Volunteered Statement.—Where a witness was shown his former deposition and asked whether he had made a copy of a certain letter, and he then volunteered to state the contents of the letter, an objection to the question does not present for review the matter of the volunteered statement in the absence of an objection thereto or a motion to exclude.—*Ib.* 309.

Same; Reservation Below.—Where the determination by the appellate court of questions involving matters of public concern cannot be had without the consideration and decision, of the constitutionality of an enactment, when a specific objection to the constitutionality of the statute is pointed out, and the pertinent parts of the legislative journals are cited, the courts must decide such question, whether raised or argued or not, in the lower court.—*State, ex rel. Knox v. Dillard*, 539.

APPEAL AND ERROR—Continued.

Appeal and Error; Review; Objections Below.—If the complaint contains a substantial cause of action, no judgment rendered thereon can be annulled, arrested or set aside for any matter not previously objected to. (§ 4143, Code 1907.)—*Hall v. First Bank of Crossville*, 627.

Appeal and Error; Review; Objections.—Where evidence has been admitted, the trial court will not be reversed unless an appropriate ground of objection is made at the trial, or unless the evidence is plainly and palpably illegal.—*Holt L. Co. v. Givens*, 640.

(d) Specification of Evidence.

Appeal and Error; Specification of Evidence.—Where the distance indicated by witness was such as "from here to the jury box" or "from here to the spittoon" they should have been given more specifically in the bill of exceptions, since they might involve a contradiction; the bill reciting that it contained all the evidence.—*L. & N. R. R. Co. v. Jenkins*, 136.

(e) Presumptions.

Appeal and Error; Review; Presumption.—Where two trials have resulted in the same verdict, an order denying a new trial will not be reversed unless, after allowing all reasonable presumptions of its correctness, the preponderance of evidence against the verdict clearly shows it to be unjust.—*Metropolitan L. Ins. Co. v. Goodman*, 304.

Appeal and Error; Presumptions.—Where the bill of exceptions does not purpose to set out all the evidence, and does not show any negligence by defendant with respect to the presence on the panel of two persons stricken by defendant, and not otherwise selected, it will be presumed on the appeal that the trial court was cognizant of the facts which justified its action in granting the new trial.—*Greer v. Malone-Beall Co.*, 401.

Same; Presumptions.—All presumptions are that the trial court committed no error.—*Capital Sec. Co. v. Owen*, 385.

(f) Exceptions.

Appeal and Error; Review; Exceptions; Necessity.—Where the trial is by the court without a jury, either party may by bill of exception present for review the judgment of the trial court on the evidence without an exception thereto, and if error is discovered, the appellate court may proceed to render such verdict as should have been rendered, or may reverse and remand.—*Wallace v. Crosthwaite*, 356.

Appeal and Error; Review; Exception.—On appeal the bill of exceptions must affirmatively show that exceptions to a part of the oral charge were taken pending the trial and before the jury retired.—*Capital Sec. Co. v. Owen*, 385.

(g) Findings by the Court or Jury.

Appeal and Error; Review; Finding of Fact.—Statutes providing that on an appeal from a judgment entered by the trial court sitting without a jury, the appellate court shall review the action of the trial court without any presumption in favor of its finding, and render such judgment as the trial court should have rendered, have application only when the opportunities of the appellate court to consider the evidence is the same as that afforded to the trial court, and the appellate court will not disturb the conclusions or findings of the trial court where the finding is based on evidence which is given ore tenus, or partly so, unless it appears that such findings and conclusions are plainly and palpably contrary to the weight of the evidence.—*Hackett v. Cash*, 403.

Same.—Acts 1915, p. 824, is not intended to require the appellate court to disregard the finding of the trial court upon the facts when such trial court had better opportunity to pass on the evidence than the appellate

APPEAL AND ERROR—Continued.

court, and if so intended it would be an invasion by the legislature of the judiciary.—*Ib.* 403.

Appeal and Error; Review; Finding of Trial Court.—Where the evidence is given *ore tenus*, or partly so, the appellate courts will not disturb the finding of the trial courts unless plainly contrary to the great weight of the evidence.—*Finney v. Studebaker Cor.*, 422.

Same.—Acts 1915, p. 824, merely dispensed with the jury trial unless demand is made, and does away with the necessity of excepting to the conclusion and finding of the trial court upon the facts, and does not change the rule as to the weight given the finding of a trial court upon the facts.—*Ib.* 422.

Same; Review; Finding.—In cases tried by the court without a jury on testimony *ore tenus*, the rule is not to reverse a finding unless it is so manifestly against the evidence that a judge *ad nisi prius* would set aside the verdict of the jury rendered on the same testimony; such finding must on appeal be given the force and effect of a verdict, and unless plainly wrong cannot be disturbed, notwithstanding the statute requires the reviewing court to review such judgment and finding without any presumption in favor of the court below on the evidence.—*Colley v. Atlanta B. & I. Co.*, 374.

Same; Review; Scope; New Trial.—Where the appeal was from the denial of a new trial by the probate court, the circuit or Supreme Court may consider affidavits presented to the probate court on the motion for a new trial, but only for the purpose of determining whether the new trial should be granted, and not for their evidentiary weight.—*Bell, et al. v. Bell, et al.*, 465.

Same; Finding of Court.—Where an issue is tried without a jury by the court on testimony *ore tenus*, the finding will not be reversed unless so manifestly against the evidence that a judge *ad nisi prius* would set aside a verdict of the jury on the same testimony.—*Ib.* 465.

(h) Showing Error.

Same; Showing Error.—Where the record showed that after an exception had been taken to a part of the court's oral charge, the court concluded its oral charge, it affirmatively appears that the exception was taken pending the trial, and before the jury retired.—*Capital Sec. Co. v. Owen*, 385.

3. Parties.

Appeal and Error; Parties; Statute.—An appeal by one of several parties to a judgment is authorized by § 2884, Code 1907, as amended by Acts 1911, p. 589.—*City of Birmingham v. Hawkins*, 127.

Same; Mode; Waiver.—Where no point was made or taken at or before the submission of the case that a proper notice of the appeal had not been given or served on the other defendant, and no severance or separate assignment of errors, there was a waiver as to such by appellee.—*Ib.* 127.

4. Judgment to Support.

Appeal and Error; Judgment to Support; Dismissal.—Where there is no valid judgment from which an appeal may be taken, the court will of its own motion dismiss the appeal.—*Temple v. Dooley*, 360.

Same.—Under § 2841, Code 1907, the giving of an affirmative charge as to a plea in abatement to a landlord's attachment, can be reviewed on appeal, provided the appeal be taken with the consent of the opposite party, such consent being a condition precedent, and jurisdictional.—*Ib.* 360.

Same; Sufficiency of Judgment Below; Waiver.—The question of the sufficiency of the judgment or decree of the lower court to support an appeal is jurisdictional, and cannot be waived.—*Ib.* 360.

APPEAL AND ERROR—Continued.

Appeal and Error; Judgment to Support; Transcript.—The failure of the transcript to show a legal judgment, as the basis for the appeal sought to be taken must result in the dismissal of such appeal.—*McLeod v. Garrish*, 389.

Same.—The judgment appealed from can be presented to this court only by a certified transcript of the record of the trial court, and a bill of exceptions cannot be looked to for the judgment.—*Ib.* 389.

Appeal and Error; Review; Decisions Reviewable.—An order granting a motion in arrest of judgment is not a final judgment, nor is it one of the interlocutory orders from which an appeal lies under the statute, and hence, such order will not support an appeal; where such appeal embraces no petition for mandamus in the alternative to correct the errors complained of, the appeal will be dismissed.—*Hershey Choc. Co. v. Yates*, 657.

5. Dictum.

Appeal and Error; Dictum.—Where the court held that a new trial should have been granted on the ground of newly discovered evidence, it was not necessary to decide as to the sufficiency of the evidence, to support the finding of the jury, and any decision thereon was dictum.—*Bell, et al. v. Bell*, et al., 465.

6. Joint and Several.

Appeal and Error; Who May Take; Joint.—An appeal from a judgment against two or more defendants may be taken by one alone, under Acts 1911, p. 589.—*Hall v. First Bank of Crossville*, 627.

Same; Assignment; Joint; Effect.—Joint assignment of errors on a joint appeal are unavailing, unless the errors are injurious to all who join.—*Ib.* 627.

7. Variance.

Same; Objection Below; Variance.—Under rule 34, Circuit Court Practice, the court will not be put in error for admitting evidence that defendant's agent or servant did the act of negligence, where there was no objection at the trial to the evidence on the grounds of variance, although there was a count in the complaint charging that defendant negligently caused or allowed the injury.—*Morrison v. Clark*, 670.

ARBITRATION AND AWARD.

Arbitration and Award; Appeal.—A judgment on an award of arbitrators is reviewable on appeal to the same extent as a judgment of the trial court itself (§ 2922, Code 1907).—*Bell v. McKay & Co.*, 408.

Arbitration and Award; Review; Scope.—Although the question submitted for arbitration may have been limited to whether defendant had a right to rescind the contract, and not to include whether he waived such right, yet the waiver question will be decided where it has been contested throughout the conduct of the cause.—*Ib.* 408.

Same; Entry of Judgment.—Where the complaint both denied defendant's right to rescind the contract, and alleged his subsequent waiver of any such right, an award which merely ascertained the rightfulness of defendant's notice of withdrawal on the day it was given, determined only a part of the issues, and the court was without authority to enter a summary final judgment in favor of defendant on the award.—*Ib.* 408.

Same.—In such a case, the submission of the question of right to rescind to arbitration and an award does not preclude a later assertion of the proposition of the waiver of such right.—*Ib.* 408.

ARRESTS.

Arrest; Mode.—An arrest may be made without actual force, or without touching the body; it is sufficient if the party arrested is within the power of the officer, and submits to arrest even as the result of a verbal command.—*C. of Ga. Ry. Co. v. Carlock*, 659.

Same; Nature.—An arrest is the taking of the custody of another person for the purpose of holding or detaining him to answer a criminal charge or a civil demand, under real or assumed authority.—*Ib.* 659.

ASSIGNMENTS.

Assignment; Benefit of Creditors; Constructive; Preference.—Under the express provisions of § 4295, a debtor's general conveyance or assignment of all of his property in payment of a pre-existing debt by which a preference was given to one or more creditors, inures to the benefit of all the creditors equally, and is in effect a general assignment for the benefit of all creditors.—*Mullins v. Palos C. & C. Co.*, 261.

Assignment; Benefit of Creditors; Enforcement.—Where a husband executed a note to his wife secured by crop mortgages which plaintiff thereafter purchased, allegations that the wife fraudulently participated in the destruction of complainant's security for such indebtedness held to show equity in a bill to declare a mortgage given by the wife to secure her pre-existing debt to be a general assignment for the benefit of all creditors under § 4295, Code 1907.—*Sheffield Nat. Bank v. Corinth B. & T. Co.*, 275.

ASSUMPSIT.

Assumpsit; Nature.—A general assumpsit is an equitable action in its nature.—*Town of Albertville v. Hooper*, 642.

Same; Defenses.—In general assumpsit no recovery can be had of money which *ex aequo et bono* belongs to defendant.—*Ib.* 642.

ATTACHMENT.

See Landlord and Tenant.

ATTORNEY AND CLIENT.

Attorney and Client; Conduct of Counsel; Presumption.—Good faith of counsel will be presumed in the absence of tangible indication to the contrary.—*Beatty v. Palmer*, 67.

AUTOMOBILES.

See Motor Vehicles.

BANKS AND BANKING.

1. Administration by State Department.

(a) Creditors' Rights.

Banks and Banking; Administration by State Department; Rights of Creditors.—Where a bank was unable to meet its engagements promptly, if not actually insolvent, and was taken charge of through the agency of the State Superintendent of Banks vested by statute with the powers and duties to such end, by bill in chancery, and such superintendent as agent, or quasi-trustee or receiver, settled an indebtedness to the bank by accepting from the debtor conveyance of a lot of land, and such settlement was ratified by the court, the court, on the petition of a creditor of the bank secured by notes and mortgages held by the bank against its debtor might protect the interest of all the parties by enforcing the creditor's lien at least to the amount of the debt for which it held the collateral, and which the bank owed it, or to its aliquot part thereof, among other creditors having a lien, since the law would imply a promise and a duty to so account.—*Walker v. Mutual A. T. Co.*, 154.

BANKS AND BANKING—Continued.

Same; Ratification by Creditors.—The filing of a petition on the part of a creditor of the bank seeking to enforce his lien as in this instance was a ratification by the creditor of the settlement made by the superintendent with the debtor of the bank.—*Ib.* 154.

Same; Claim of Creditors; Venue.—Under Acts 1911, p. 83, the proceedings here attempted may be maintained against the superintendent in his representative capacity in the county in which he was administering the trust, and in the same court in which he was acting as quasi-receiver.—*Ib.* 154.

Same; Compromise of Debt; Validity.—Having acted in the matter of compromising the debt to the bank, and his action having been approved by the court and the parties in interest, the superintendent of banks could not set up the invalidity of his act as an answer to this petition.—*Ib.* 154.

2. Generally.

Banks and Banking; Deposits; Evidence.—Where the action was to recover deposits alleged to have been made, and the bank books were introduced in evidence, and did not show the deposits, evidence of defalcations by the cashier which raised an inference that he converted the deposits, is admissible.—*Bank of Phoenix City v. Taylor*, 665.

BILLS OF EXCEPTIONS.

1. Presentation.

Bill of Exceptions; Presentation; Time.—Where bill of exceptions was presented 92 days after judgment entered, it was not presented within the time required by § 3019, Code 1907, and on motion must be stricken.—*Rice v. Beavers & Co.*, 355.

2. Establishing.

Bill of Exceptions; Authenticity.—Where the trial judge had died pending the signing of a bill of exceptions, and no motion was made in this court to establish such bill, rulings on the trial properly shown by bill of exceptions cannot be considered on appeal, and written agreement of counsel cannot be taken and considered as bill of exceptions.—*McLeod v. Garish*, 389.

Same; Establishment.—On proper motion in the appellate court written agreement of counsel in this case would have been sufficient evidence upon which to establish bill of exceptions, as provided by the statute.—*Ib.* 389.

BILLS AND NOTES.

Bills and Notes; Money at Place of Payment.—If money for the payment of a note awaits the holder at the time and place for payment, this is the equivalent of a tender under § 5025, Code 1907.—*Moore, et al. v. Altom*, 158.

Same; Presentation; Necessity.—If the holder of a note does not present his note for payment where payment is tendered, he does not thereby forfeit his debt, but only the cost of collecting it elsewhere.—*Ib.* 158.

Bills and Notes; Presentment and Dishonor; Notice to Maker.—The maker of a note is not entitled to presentment or notice of dishonor.—*Hall v. First Bank of Crossville*, 627.

Same; Defenses.—In an action on a note, one may show that he is not liable as a maker but only as an endorser.—*Ib.* 627.

Bills and Notes; Negotiation; Endorsement.—Under Acts 1909, p. 154, § 184, the maker of a note is primarily liable, and will be presumed to have endorsed it to complete its negotiation to plaintiff.—*Ib.* 627.

Bills and Notes; Notice of Dishonor; Averment.—Before an endorser can be liable for the payment of a note, notice of dishonor must be averred and proven as required by the statute.—*Ib.* 627.

BILLS AND NOTES—Continued.

Same; Amendment.—Under § 29, Acts 1909, p. 141, where the complaint in an action on the note does not allege notice of dishonor to the endorser, an amendment may be allowed, or the action dismissed as to such endorser.—*Ib.* 627.

BOUNDARIES.

Boundaries; Establishment; Acquiescence.—Where, after a survey, and with the knowledge and consent of the adjoining owner, a lot owner moved the boundary fence between the two lots to conform with the survey, the acquiescence of the adjoining owner in the survey *prima facie* indicated its validity, and raised a presumption of its correctness.—*Chambliss v. Jones*, 175.

Same; Evidence.—The evidence examined and held to show that the boundary line was as claimed by the complainant.—*Ib.* 175.

BROKERS.

Brokers; Completion of Contract; Commission.—Where plaintiff negotiated a sale of defendant's property to the government, but the title was defective, and it was agreed that the government should condemn the land, and that the price agreed upon at the sale should be found as the value of the land, and such agreement was carried out, and the amount paid to defendant, the transfer was not voidable by the government at its option, even though plaintiff used improper influence to induce the sale; the judgment becoming final by the payment, and defendant could not resist an action for plaintiff's commission by a plea that plaintiff had used improper means to influence the government to enter into the contract.—*Russell v. Bush*, 309.

Brokers; Compensation; Services.—A broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser who is ready, able and willing to purchase on the terms named, or if he brings them together, and a sale is afterwards consummated by the seller himself.—*Kellar v. Jones & Weeden*, 417.

Same.—Where a broker is working under a special contract stipulating that if the sale was made by the owner, the broker should receive half commission, such broker is entitled to the stipulated commission upon securing a prospective purchaser, and a sale by the owner to such person.—*Ib.* 417.

Same.—Where a broker performed all the services required of him by the owner, and the owner accepts such services, and consummates a sale to the purchaser so that nothing remains to be done except to pay the compensation promised, such broker is entitled to recover such compensation under the common count.—*Ib.* 417.

Brokers; Compensation; Instructions.—Where the action was based both upon the common count and upon a written contract, and under the evidence a recovery could be had under the common count, charges asserting that unless the broker procured from the purchaser a bona fide offer for the land, he could not recover, although intended to apply to the count on the special contract, were properly refused as they would deny a recovery even upon the common count.—*Ib.* 417.

BUILDING AND LOAN ASSOCIATIONS.

Building and Loan Association; Subscription; Contract.—Where the purchaser of a building and loan contract sues to recover premiums paid, based on fraud or misrepresentation, and such purchaser had signed a contract stating his understanding that the company was not bound by any misrepresentation made by its agents, the purchaser was bound by its terms unless he was prevented from reading the contract by the fraudulent representations of the seller, or of the seller's agent.—*Capital Sec. Co. v. Owen*, 385.

CANCELLATION OF INSTRUMENTS.

Cancellation of Instruments; Parties; Respondent.—Upon a bill to foreclose and to cancel, the grantee in the conveyance sought to be cancelled was a necessary party respondent, since complainant's rights could not be satisfactorily and completely determined without such party.—*Mitchell v. Cudd*, 162.

Cancellation of Instruments; Mental Incapacity; Proof.—Since the law presumes every one sane until the contrary appears, a bill to cancel a mortgage and a deed on account of the mental incapacity of the mortgagor and grantor to execute the contract, is not sustained, where complainants made no proof of such incapacity at the time of the execution of the contract.—*Johnson v. Pinckard & Lay*, 259.

CARRIERS.

1. Of Goods.

(a) Connecting Carrier.

Carriers; Goods; Connecting Carrier.—The Carmack Amendment (U. S. Comp. Stat. 1913, § 8592) does not abrogate or impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by state statutes or decisions.—*L. & N. R. Co. v. Lynne*, 21.

Same; Connecting; Burden of Proof.—Where the action is against a terminal carrier for loss of goods, the burden is on plaintiff to show that his goods were lost or diverted while in the custody of defendant.—*Ib.* 21.

Same.—Where it is shown that defendant railroad delivered to plaintiff a part of the original shipment, the presumption arises of its receipt by defendant railroad in the same condition as when delivered to the initial carrier and imposes upon defendant railroad the burden of showing that the missing goods were not lost while in its custody.—*Ib.* 21.

Same; Hearsay.—In such a case the declaration of a depot agent that the goods were short, and would arrive, is but hearsay, and not a verbal declaration within the scope of duty then being performed.—*Ib.* 21.

Same; Evidence.—Where the clerk did not see the car opened his testimony that at the point of delivery to defendant the car was found short of the goods complained of, was not sufficient to overcome a presumption that the missing goods came into defendant's possession.—*Ib.* 21.

Same.—Where the suit was for loss of goods by a carrier, the admission in evidence of the declaration of a depot agent that the goods were short, and would arrive, while technically erroneous was not prejudicial to a reversal.—*Ib.* 21.

2. Freight Rate and Undercharges.

Carriers; Goods; Freight Rate.—The general rule is that the consignee and carrier are alike charged with notice of the lawful freight rate.—*Emerson v. C. of Ga. Ry. Co.*, 280.

Same.—The carrier and the shipper are alike bound by the lawful freight rate, notwithstanding mistake, inadvertence, honest agreement or good faith.—*Ib.* 280.

Same.—It is the duty of a common carrier to inform the consignee of the correct freight rate, according to the classification and rates on file respectively with the Interstate Commerce Commission, in the case of interstate shipments, and with the Railroad Commission as to intrastate shipments, and on payment or tender of the amount thus due, to deliver the freight to the consignee, on its arrival.—*Ib.* 280.

Same; Undercharges; Action.—In an action for an undercharge of freight, the published classification and rates on file with the railroad commission are admissible in evidence as showing the classification and rate for such a shipment.—*Ib.* 280.

CARRIERS—Continued.

Same.—Under sections 5521-23, and sections 5527, 5531, 5532 and 5553-5555, and sections 7671 and 7674, and 5550, Code 1907, where it did not appear that a consignee of a horse was the owner, but the evidence tended strongly to show that he was such owner, the railroad suing for undercharges in freight was entitled to an affirmative instruction against such consignee for the difference between the freight paid, and the published rate.—*Ib.* 280.

2. Of Passengers.

(a) Complaints and Other Pleadings.

Carriers; Passenger; Complaint.—Counts of the complaint averring the relationship of passenger and carrier between plaintiff and defendant, and charging that after plaintiff reached her destination, the train of defendant on which she was being carried did not stop a reasonable length of time for her to alight, and that while she was near one of the steps of the coach, one of the servants of defendant recklessly, wantonly and intentionally injured plaintiff by taking hold of her and pulling her off the train, while it was in motion, charged wanton negligence, and was not objectionable as charging both wantonness and simple negligence.—*C. of Ga. Ry. Co. v. Mathis*, 32.

Same; Replication; Demurrer.—Where defendant set up contributory negligence in that the train stopped a sufficient length of time at said station to allow passengers to alight or embark, the plaintiff failed to get off the train at her destination, although she knew it had been reached, but after the train was put in motion she ran out of the train and jumped from the step, falling and receiving injuries; and another plea averring the same facts, and that though warned, plaintiff jumped from said train, a special replication to both pleas alleging that plaintiff's acts were done as a result of the invitation, direction or request of the servant of defendant, was not demurrable, or if demurrable, the sustaining of the demurrer thereto was not reversible error, the replication being good as to the first plea, and merely denying the special averments of the second plea, which denial the plaintiff had the benefit of under the general replication.—*Ib.* 32.

Carriers; Passengers; Complaint.—Counts charging simple negligence, and alleging that defendant was a common carrier of passengers, that plaintiff was a passenger, and that defendant so negligently conducted itself in and about her carriage thereon, that at a certain time and place plaintiff was thrown or caused to fall from the car, was sufficient.—*B'ham Ry., L. & P. Co. v. Gray*, 42.

(b) Alighting.

Carriers; Passengers; Alighting; Negligence.—Where plaintiff contended that when she alighted from the moving train she did so at the request and with the assistance of the porter on the train, the court could not, as a matter of law, declare such act contributory negligence, since whether one is guilty of negligence in voluntarily alighting from a moving train depends on the circumstances surrounding the parties at the time, the speed of the train, etc.—*C. of Ga. Ry. Co. v. Mathis*, 32.

Same.—Where the passenger claimed that she was not notified that the train had reached her destination, and hence, had to alight while it was in motion, a charge asserting that a railroad company is not required to stop beyond a reasonable length of time to allow passengers to alight was inapplicable as omitting the question whether plaintiff knew that the train had reached her destination.—*Ib.* 32.

(Carriers; Passengers; Invitation to Alight.—Where a railroad passenger's destination is called as of the next stop, and the train soon afterwards comes to a full stop, though it was at a switch and not at the station, there

CARRIERS—Continued.

was an implied invitation for the passenger to alight, and the railroad was liable for its negligent failure to provide her with a safe place to do so.—*Franklin v. So. Ry. Co.*, 118.

Same; Duty.—The law imposes upon all carriers the duty to exercise the highest degree of care, skill and diligence in the transportation of passengers.—*Ib.* 118.

Same; Instructions.—Where the action was for injuries to a passenger while alighting, and there was evidence that plaintiff was not aware that the train was not at the regular station, and having her baby in her arms, could not see just where it was, and that the flagman had his face towards her, and her suitcase in his hand, having helped her other child off the train, a charge asserting that the flagman was not charged with any duty of notifying plaintiff not to get off, unless he knew that she was going to do so, and knew that plaintiff did not know that she was not at the station, was erroneously given.—*Ib.* 118.

Same; Duty of Flagman.—Where the train had stopped at a switch near the depot, and the flagman believed that a woman passenger was not aware that the train was not at its regular stopping place, it was his duty to inform her, particularly where the ground at the switch was rough and unsafe.—*Ib.* 118.

(c) Instructions.

Carriers; Passengers; Injuries; Instruction.—Where the action was by a passenger for personal injuries, an instruction, hypothesizing the allegations of complainant, and asserting that if plaintiff was injured as alleged as a proximate consequence of defendant's negligence as alleged, and if defendant negligently closed its gates on plaintiff as alleged, while plaintiff was alighting from its car, plaintiff could recover, was proper.—*B'ham Ry., L. & P. Co. v. Gray*, 42.

Same; Care Required.—The law requires the highest degree of care, diligence and skill of those engaged as common carriers of passengers known to careful, diligent and skillful persons engaged in such business, consistent with the practical operation of the business.—*Ib.* 42.

CHARGE OF COURT.

For instructions in particular actions and crimes, see that title.

See also Appeal and Error.

1. Misleading.

Charge of Court; Misleading; Request.—Where parts of the oral charge possessed misleading tendencies, they should have been removed by requested explanatory charges.—*L. & N. R. R. Co. v. Davis*, 14.

Charge of Court; Misleading.—Where a charge given is merely questionable or possibly misleading, its giving will not be held error if the adverse party fails to request an explanatory charge.—*Republic I. & S. Co. v. Howard*, 663.

2. Inapt.

Same; Inapt.—Charges which are inapt to the evidence, are properly refused.—*L. & N. R. R. Co. v. Davis*, 14.

3. Covered by Those Given.

Same; Covered by Those Given.—It is not error to refuse requested instructions fully or substantially covered by instructions given.—*L. & N. R. R. Co. v. Davis*, 14.

Charge of Court; Covered by Those Given.—It is not error to refuse charges substantially covered by written charges given.—*Landers v. Layes*, 533.

CHARGE OF COURT—Continued.

Same; Covered by Those Given.—It is not error to refuse charges covered by written charges given.—*Madison v. The State*, 590.

Same; Covered by Those Given.—It is not error to refuse charges which are substantially covered by charges given.—*Republic I. & S. Co. v. Howard*, 663.

Charge of Court; Covered by Those Given.—It is not error to refuse charges substantially covered by charges given.—*Ala. G. S. R. R. Co. v. Loveman C. Co.*, 683.

4. Construction.

Charge of Court; Construction.—Where the charge as a whole correctly and fairly submitted the matters in controversy, it will not be held to be erroneous although isolated portions thereof are abstract and somewhat misleading.—*Beatty v. Palmer*, 67.

Charge of Court; Instruction.—In construing instructions the charge should be considered as a whole.—*Thrasher v. Neeley*, 576.

5. Ignoring Issues and Evidence.

Charge of Court; Ignoring Issues.—Although abstractly correct, a charge which ignores issues raised by the evidence is properly refused.—*Ray v. Brannan*, 113.

Same; Ignoring Evidence.—Charges which ignore evidence as to material matters in controversy may be refused without error.—*Kellar v. Jones & Weeden*, 417.

6. Directing Verdict.

Trial; Directing Verdict.—If, when plaintiff has introduced all his evidence, it does not tend to prove his cause of action, the court may refuse to hear evidence from defendant, but it is only in the absence of all evidence against defendant that the court should direct a verdict; if there be any evidence tending to establish plaintiff's case, the court should not withdraw the cause from the jury.—*L. & N. R. R. Co. v. Jenkins*, 136.

Trial; Directing Verdict.—Where the evidence is open to a reasonable inference of a material fact unfavorable to the right of recovery by the party requesting a directed verdict, the affirmative charge should never be given.—*Ward v. Limblad*, 146.

Trial; Conflicting Evidence.—Where there is a conflict in the evidence as to any material matter, it is proper to deny the affirmative instruction.—*Metropolitan L. Ins. Co. v. Goodman*, 304.

Charge of Court; Directing Verdict.—Where evidence is in conflict as to the material facts upon which the right of recovery depends, the court cannot properly direct the verdict.—*Peoples Shoe Co. v. Skally*, 349.

Charge of Court; Directing Verdict.—Where there was evidence to support more than one count of the complaint, it was proper to refuse a charge to the effect that if the jury believe the evidence they must find for defendant.—*Georgia Cotton Co. v. Lee*, 599.

Charge of Court; Directing Verdict.—Where there was evidence which tended to establish plaintiff's case, the court was without power to withdraw the case from the jury.—*Morrison v. Clark*, 670.

7. Applicability to Evidence and Issues.

Charge of Court; Applicability to Evidence.—Where the action was upon a note, and there was no evidence that the debtor ever directed payment to be applied on the note, a charge asserting that the debtor had the right to direct what note the payment by him should be applied to, and credit be given as directed, was abstract and properly refused.—*Porter, et al. v. Watkins*, 333.

CHARGE OF COURT—Continued.

8. Singling Out Evidence.

Same; Singling Out Evidence.—Charges which give undue prominence to particular parts of the evidence are refused without error.—Kellar v. Jones & Weeden, 417.

Same; Undue Emphasis.—It is proper to refuse charges which give undue emphasis or prominence to particular portions of the evidence.—Madison v. The State, 590.

9. Argumentative.

Charge of Court; Argumentative.—Argumentative charges may be properly refused.—Kellar v. Jones & Weeden, 417.

Charge of Court; Argumentative.—It is proper to refuse instructions which are argumentative.—Madison v. The State, 590.

10. Effect of Evidence.

Charge of Court; Effect of Evidence.—Where the action was assumptit for commissions on automobiles sold by plaintiff, and defendants relied on a custom or usage of trade, but there was no proof of such customs or that plaintiff had knowledge thereof, its oral charge that the jury were to have regard only to the contract itself, was not improper as a charge on the effect of evidence under § 5362, Code 1907.—Cole Motor C. Co. v. Tebault, 382.

11. Reasonable Doubt.

Charge of Court; Reasonable Doubt.—A charge that if any one of the jury had a reasonable doubt of the guilt of defendant from the evidence, the jury should give the benefit of the doubt to defendant, and not convict him, would impose upon the rest of the jury the reasonable doubt entertained by only one juror, and its refusal was proper.—Martin v. The State, 584.

Same; Presumption of Innocence.—A charge asserting that the burden of proof was not shifted from the state to the defendant, and that the presumption of innocence continued with defendant until the evidence convinced the jury that he could not be guiltless, and that unless that was done, they should acquit, was faulty, as tending to mislead the jury to conclude that defendant could not be convicted unless the jury were absolutely convinced of his guilt.—Ib. 584.

Charge of Court; Reasonable Doubt.—Supposition has no legitimate sphere or habitation in judicial procedure, and hence, a charge asserting that the jury cannot find defendant guilty unless they believe him guilty beyond all reasonable supposition, was properly refused.—Dawson v. The State, 593.

Charge of Court; Mind of Juror.—The fact that the mind of any one juror was in a state of doubt or uncertainty, might warrant a mistrial, but would not warrant a verdict for defendant.—Morrison v. Clark, 570.

12. Stating No Legal Proposition.

Same; Involving no Proposition of Law.—A charge instructing that the jury must construe every reasonable doubt in favor of defendant, was properly refused as stating no proposition of law, since a reasonable doubt cannot be construed.—Martin v. The State, 584.

13. Willfully or Corruptly Swearing.

Charge of Court; Corrupt Swearing.—Where there was evidence tending to show that a witness gave willful or corruptly false testimony as to a material fact, it was error to refuse a charge that if the jury found he gave such false testimony, they might disregard his entire testimony.—Reynolds v. The State, 586.

Same; Credibility of Witness.—Where there was evidence that a witness had made contradictory statements concerning material facts it was

CHARGE OF COURT—Continued.

error to refuse to instruct the jury that they might consider such statement in determining the weight of the witness's testimony; § 5364, Code 1907, as amended by Acts 1915, p. 815, not applying.—*Ib.* 586.

14. Abstract.

Same; Abstract.—Where the evidence showed that the cotton was graded by defendant, and by plaintiff's agent, but not by plaintiff in person, a charge to the effect that before plaintiff could recover he must show that in grading the cotton, the agents of defendant undergraded it, and graded it below the grade that it actually showed, and that at the time plaintiff protested and objected, stating that the grades were incorrect, was properly refused.—*Georgia Cotton Co. v. Lee*, 599.

CHARTER PARTY.

See Shipping.

CODE SECTIONS CITED AND CONSTRUED.

- 11. *Rice v. Beavers & Co.*, 355.
- 158. *Searcy v. Cullinan Co.*, 287.
- 210. *Searcy v. Cullman Co.*, 287.
- 211. *Searcy v. Cullman Co.*, 287.
- 1275. *City of Birmingham v. McKinnon*, 56.
- 1279. *Ward v. Markstein*, 209.
- 1295. *Ward v. Markstein*, 209.
- 1313. *Town of Albertville v. Hooper*, 642.
- 1341. *Ward v. Markstein*, 209.
- 1464. *State, ex rel. Knox v. Dillard*, 539.
- 1500. *Searcy v. Cullman Co.*, 287.
- 2091. *State v. Doster-N. Drug Co.*, 447.
- 2092. *State v. Doster-N. Drug Co.*, 447.
- 2093. *State v. Doster-N. Drug Co.*, 447.
- 2102. *State v. Doster-N. Drug Co.*, 447.
- 2143. *State v. Wes. U. T. Co.*, 570.
- 2145. *State v. Wes. U. T. Co.*, 570.
- 2223. *State v. Doster-N. Drug Co.*, 447.
- 2260. *State v. Doster-N. Drug Co.*, 447.
- 2266. *State v. Doster-N. Drug Co.*, 447.
- 2272. *Gilliland v. Armstrong*, 513.
- 2379. *Gilliland v. Armstrong*, 513.
- 2411. *Allgood v. Sloss-S. S. & I. Co.*, 500.
- 2485. *Garrett v. L. & N. R. R. Co.*, 52.
- 2503. *First Nat. Bank v. Henderson*, 396.
- 2841. *Temple v. Dooley*, 360.
- 2884. *City of Birmingham v. Hawkins*, 127.
- 2922. *Bell v. McKay & Co.*, 408.
- 2925. *Seals P. & O. Co. v. Bell*, 290.
- 2961. *Berthold & J. L. Co. v. Phalin L. Co.*, 362.
- 3019. *Rice v. Beavers & Co.*, 355.
- 3124. *Smith v. Lambert*, 269.
- 3126. *Smith v. Lambert*, 269.
- 3128. *Smith v. Lambert*, 269.
- 3133. *Smith v. Lambert*, 269.
- 3256. *Wallace v. Cook Brew. Co.*, 245.
- 3374. *Sulzby v. Palmer*, 645.
- 3413. *Guin v. Guin*, 221.
- 3663. *Danforth v. McClellan*, 567.
- 3687. *Colley v. Atlanta B. & I. Co.*, 374.

CODE SECTIONS CITED OR CONSTRUED—Continued.

- 3734. Wallace v. Crosthwaite, 356.
- 3789. Knight v. Garden, 516.
- 3793. Dabbs v. Dabbs, 164.
- 3882. Smith v. Jeffcoat, 96.
- 3910. Ala. G. S. R. R. Co. v. Taylor, 37.
- 3910. United States C. I. P. & F. Co. v. McCoy, 45.
- 3910. B'ham So. Ry. Co. v. Stephens, 107.
- 3967. Knight v. Garden, 516.
- 3967. Sulzby & Palmer, 645.
- 4007. Guin v. Guin, 221.
- 4049. Russell v. Bush, 309.
- 4055. Russell v. Bush, 309.
- 4057. Russell v. Bush, 309.
- 4058. Russell v. Bush, 309.
- 4058. Sovereign Camp W. O. W. v. Ward, 327.
- 4143. Hershey Choc. Co. v. Yates, 657.
- 4145. Hall v. First Bank, 627.
- 4197. Todd v. Interstate M. & B. Co., 169.
- 4263. Ex parte Edwards, 638.
- 4271. Ex parte Edwards, 683.
- 4283. Ex parte Edwards, 638.
- 4287. Beasley v. Burrough & T. Co., 397.
- 4295. Mullins v. Palos C. & C. Co., 261.
- 4295. Sheffield N. Bank v. Corinth B. & T. Co., 275
- 4299. Metropolitan L. I. Co. v. Goodman, 304
- 4497. Griffin v. Dawsey, 218.
- 4572. Metropolitan L. I. Co. v. Goodman, 304.
- 4623. Miller v. Graham, 230.
- 4748. Seals P. & O. Co. v. Bell, 290.
- 4785. J. C. Walden Auto Co. v. Mixon, 346.
- 4810. J. C. Walden Auto Co. v. Mixon, 346.
- 5025. Moore v. Altom, 158.
- 5203. Betts, et al. v. Ward, 248.
- 5205. Martin v. Cannon, 151.
- 5214. Betts, et al. v. Ward, 248.
- 5215. Betts, et al. v. Ward, 248.
- 5220. Langley, et al. v. Langley, 566.
- 5221. Betts, et al. v. Ward, 248.
- 5231. Betts, et al. v. Ward, 248.
- 5326. Berthold & J. L. Co. v. Phalin L. Co., 362.
- 5332. Knight v. Garden, 516.
- 5332. Sulzby v. Palmer, 645.
- 5332. Ala. G. S. R. R. Co. v. Loveman C. Co., 683.
- 5362. Cole Motor C. Co. v. Tebault, 382.
- 5364. Reynolds v. The State, 586.
- 5367. Georgia Cotton Co. v. Lee, 599.
- 5372. Reed v. Hammond, 302.
- 5373. Reed v. Hammond, 302.
- 5385. Thrasher v. Neeley, 576.
- 5389. Thrasher v. Neeley, 576.
- 5394. Thrasher v. Neeley, 576.
- 5450-72. State, ex rel. Knox v. Dillard, 539
- 5476. L. & N. R. R. Co. v. Davis, 14.
- 5476. Ala. G. S. R. R. Co. v. Smith, 77.
- 5521. Emerson v. C. of Ga. Ry. Co, 280.
- 5523. Emerson v. C. of Ga. Ry. Co., 280.
- 5527. Emerson v. C. of Ga. Ry. Co., 280.

CODE SECTIONS CITED OR CONSTRUED—Continued.

- 5531. Emerson v. C. of Ga. Ry. Co., 280.
- 5532. Emerson v. C. of Ga. Ry. Co., 280.
- 5550. Emerson v. C. of Ga. Ry. Co., 280.
- 5553. Emerson v. C. of Ga. Ry. Co., 280.
- 5555. Emerson v. C. of Ga. Ry. Co., 280.
- 5999. Madison v. The State, 590.
- 6256. Paitry v. State, 598.
- 6664. Ray v. Collins, 478.
- 6666. Ray v. Collins, 478.
- 6683. Wallace v. Crosthwaite, 356.
- 6888. Ray v. Collins, 478.
- 7671. Emerson v. C. of Ga. Ry. Co., 280.
- 7674. Emerson v. C. of Ga. Ry. Co., 280.

COMMERCE.

1. Federal Liability Act.

Commerce; Interstate; Federal Liability Act.—Where the plaintiff was engaged as a railroad fireman in a crew making up interstate trains, and was injured during a temporary lull in the work in which he was engaged, he was engaged in interstate commerce when injured, and his case was properly brought under the Federal Employer's Liability Act.—Ala. G. S. R. R. Co. v. Shotzy, 25.

COMPROMISE AND SETTLEMENT.

Compromise and Settlement; Consideration.—The existence of a mere controversy is not sufficient to support a contract based upon the settlement of the controversy, unless based upon some consideration in the shape of something beneficial to one party, or detrimental to the other.—Daniel v. Hughes, 368.

Same; Merits of Controversy.—Whether its legal validity is known or not, a claim without legal merit and absolutely and clearly not sustainable in law or equity cannot constitute a legal consideration for a compromise and settlement.—Ib. 368.

Same; Action; Complaint.—A count alleging that plaintiff held a claim against defendant in the sum of \$1,500 for the breach of an agreement, and a promise by defendant to pay plaintiff \$900, in consideration of the settlement of the controversy, which plaintiff accepted, but which defendant has failed to pay, and another count alleging the controversy regarding the claim against defendant by plaintiff for a commission for selling lands, whereby defendant was to pay \$900, at a certain place, and defendant's failure to meet plaintiff at the appointed place, and his failure to pay, were demurrable for failing to aver that defendant owed plaintiff anything upon the matter out of which the controversy arose, or any fact showing that the controversy was supported by a valuable consideration.—Ib. 368.

Compromise and Settlement; Defenses; General Issue.—Where the proof failed to show that the controversy declared upon afforded a basis for a valuable consideration for the settlement alleged, such defense was available under the general issue.—Ib. 368.

CONFIDENTIAL COMMUNICATIONS.

See Witnesses, § 3.

CONSTITUTIONAL LAW.

See Statutes.

1. Separating Powers.

Constitutional Law; Separating Powers; Blending.—The provisions of Local Acts 1915, p. 293, are not violative of §§ 32 and 43 of the Constitution of 1901.—Dunn v. Dean, 486.

CONSTITUTIONAL LAW—Continued.

2. Decision of.

Constitutional Law; Necessity of Decision.—The constitutionality of a law will not be considered on appeal, unless essential to the decision of an actual case.—State, ex rel. Knox v. Dillard, 539.

Appeal and Error; Suggestions of Error.—The appellate courts will not search for constitutional objections on a general suggestion of unconstitutionality.—Ib. 539.

CONSTITUTION CITED OR CONSTRUED.

- §6. Dunn v. Dean, 486.
- 29. Dunn v. Dean, 486.
- 45. Dunn v. Dean, 486.
- 45. State, ex rel. Mims v. Bugg, et al., 460.
- 62. Dunn v. Dean, 486.
- 62. State, ex rel. Knox v. Dillard, 539.
- 89. Ward v. Markstein, 209.
- 104. State, ex rel. Brown v. Slaughter, 428.
- 104. Dunn v. Dean, 486.
- 104. State, ex rel. Knox v. Dillard, 539.
- 104. Dawson v. The State, 593.
- 105. State, ex rel. Brown v. Slaughter, 428.
- 105. Dunn v. Dean, 486.
- 106. Dunn v. Dean, 486.
- 106. State, ex rel. Knox v. Dillard, 539.
- 106. Dawson v. The State, 593.
- 233. Ala. G. S. R. R. Co. v. Loveman C. Co., 683.

CONTINUANCE.

Continuance; Discretion; Statute.—Where an action was instituted by attachment July 7, and complaint was filed Nov. 13, thereafter, three days before the first day of the term, or six days before the return of the attachment, or the time when the complaint was required to be filed, while defendant could have made demand on plaintiff for bill of particulars at any time after the suing out of the attachment, the refusal of the court to grant defendant's motion for a continuance made Nov. 18, after having demanded bill of particulars, under § 5326, Code 1907, on Nov. 14, was not an abuse of discretion.—Berthold & J. L. Co. v. Geo. W. Phalin L. Co., 362.

CONTRACTS.

See Sales.

1. Law Governing.

Contracts; Law Governing.—Ordinarily a contract is governed as to its nature, obligation, validity and interpretation by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other state, in which case the law of the place of performance, or the law which both parties had in mind must govern.—W. U. Tel. Co. v. Favish, 4.

2. Mutuality.

Contract; Mutuality.—A contract between a mortgagor and a mortgagee by which a mortgagee agrees to accept payment of the mortgage debt in shares of stock, is not void for want of mutuality because it does not bind the mortgagor to procure such shares of stock, if the mortgagor actually procured the stock and tenders delivery thereof.—McKenzie v. Stewart, 241.

3. Avoidance.

Contracts; Avoidance; Restitution.—A party may not avoid a voidable contract, and at the same time enjoy the benefits derived thereunder.—Bettis et al. v. Ward, 248.

CONTRACTS—Continued.

4. Rescission.

Evidence; Contract of Sale; Fraud.—Where the action was for goods sold under a contract, and the testimony showed that the contract as signed by the buyer was not the one made by him, but was signed upon the misrepresentation of the agent of the seller, testimony of the buyer as to what articles he contracted to purchase was relevant in connection with the other evidence going to show that the contract signed did not speak the truth; so also was the testimony of the witness who was present at the trade admissible as corroborative of that of the buyer.—*Commerce F. Co. v. Cooper Bros.*, 285.

Contracts; Rescission; Fraud.—A contract executed by one in reliance upon false representation as to its contents is not binding upon the party deceived, if he elects to avoid it, notwithstanding he could read, and had an opportunity to read before signing it, since the party asserting facts cannot complain that the other took him at his word.—*Ib.* 285.

5. Performance, etc.

Contracts; Failure to Perform; Right of Recovery.—Where the contract to drive a well was entire and plaintiff failed to fully and substantially perform, he could not recover on the contract, without more.—*Hartsell v. Turner*, 299.

6. Breach.

Contract; Breach; Election.—Where a contract is breached by one party, the other party thereto must elect between treating the contract as dissolved in toto, and insisting on further performance.—*Lowy v. Rosengrant*, 337.

Contract; Time; Waiver.—Where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made, as where he recognizes the contract as still in force after the time for performance has passed.—*Ib.* 337.

7. Construction.

Contracts; Construction; Intent.—The contract stated and examined and it is held that since the intent of the parties governed, defendant was not bound by that portion of the contract placing particular obligations on the corporation, subsequent references to the parties of the second part showing that defendant is not included.—*First Nat. Bank v. Henderson*, 393.

Contracts; Construction; Ambiguous Provision.—Where there is nothing to the contrary in its language, the parties to a contract, by mutual consent, may interpret the ambiguous provisions for themselves, in which event the court will enforce the contract according to such interpretation.—*B'ham W. W. Co. v. Hernandez*, 438.

CONTRIBUTION.

See *Mortgages*, § 3.

Contributions; Exoneration.—If equity has jurisdiction, it will apportion the burden ratably among the several debtors where there is a single claim against them; or if one is compelled to pay more than his share, will give him contribution against the other.—*Interstate L. & I. Co. v. Logan*, 196.

CORPORATIONS.

1. Ultra Vires.

Corporations; Ultra Vires; Contract Exempting From Liability.—A contract between a railroad company and a corporation, whereby the railroad company is exempted from negligent fires in consideration of the use of

CORPORATIONS—Continued.

the part of the railroad's right of way in connection with the business of the corporation, is void as ultra vires the corporation if it is not authorized by the charter of the corporation.—*Ala. G. S. R. Co. v. Loveman C. Co.*, 683.

Same; Ratification by Stockholders.—By a ratification thereof the stockholders of a corporation may render binding acts done which are within the powers of the corporation, although ultra vires its officers or a mere majority of the stockholders, but they cannot ratify acts done ultra vires the corporation.—*Ib.* 683.

Corporations; Ultra Vires; Ratification.—Acts ultra vires the corporation because not authorized by its charter or necessarily incident to its charter powers, cannot be ratified by the stockholders under § 233, Constitution 1901.—*Ib.* 683.

COSTS.**1. Security for.**

Costs; Security for; Non Resident; Discretion.—The matter of the time allowed a non resident plaintiff to give security for costs as required by § 3687, et seq., Code 1907, is largely within the discretion of the trial court, and the action of the court in permitting such security to be given "within the time directed by the court" is not an abuse thereof.—*Colley v. Atlanta B. & I. Co.*, 374.

Appeal and Error; Harmless Error; Security for Costs.—Any error in allowing a non resident plaintiff to give security for costs after a filing of the complaint, if error, was without injury, where there was no dispute that defendant owed the amount claimed, and the only dispute was as to credits on which issue the case was tried.—*Ib.* 374.

2. Judgment for Residue.

Costs; Judgment for Residue; Statute.—Under § 3663, Code 1907, where plaintiff recovered \$10 damages and \$10 costs in a tort action, and there was no certificate that plaintiff should have recovered more damages, the action of the court in refusing to enter judgment against plaintiff for the residue of costs was erroneous.—*Danforth v. McClellan*, 567.

Same.—In the absence of such a certificate from the record that plaintiff should have recovered more damages the appellate courts cannot presume that such certificate was made.—*Ib.* 567.

Same; Witness's Fees; Liability.—Judgment in favor of a party for costs does not relieve him from liability to the officers or the witnesses for their fees, although a judgment has gone against the other party for cost, which includes such fees.—*Ib.* 567.

Same; Statutory Provision; Instruction.—As used in the statute the word "residue" includes all costs plaintiff could have recovered whether expended by plaintiff or defendant, less \$10 in this case, since a judgment for full costs includes all the fees earned by the officers and witnesses in the case, regardless of the party for which the services were rendered, as judgment for costs can only be rendered for parties to the suit.—*Ib.* 567.

COTTON.

See Words and Phrases, § 1.

COUNTIES.**1. Officers and Bonds of.**

Counties; Treasurer's Bond; Statute.—The fact that the county treasurer's bond was made payable to the State of Alabama instead of to the particular county, was of no importance or bearing in the county's action on the bond.—*Searcy v. Cullman Co.*, 285.

COUNTIES—Continued.

Same; Obligation; Special Fund.—Considering §§ 210-211, 1500, Code 1907, where the treasurer subsequently received and misappropriated money from a special fund derived from the sale of county bonds, for the construction and maintenance of public roads, the action being by the county against the treasurer and his sureties on his general official bond, it is held that §§ 210 and 1500 are in *pari materia*, and must be considered in view of that relation, that the surety's obligation included the assurance of his fidelity with respect to the special fund, and that the term "additional" meant "supplemental," though an additional bond would not supersede the original bond or minimize the surety's obligation thereon.—*Ib.* 285.

Counties; Officers.—General Acts 1915, p. 348, abolishes the office of county treasurer in all counties of a population of 50,000 or less, and does not merely suspend the existence of the office of such county.—*State, ex rel. Mims v. Bugg*, 460.

2. Claims Against.

Counties; Claims; Liability.—No officer can charge a county with the payment of any claim due him, however meritorious, or whatever benefit the county may have derived therefrom, unless expressly or by necessary implication it is authorized by law; the policy of the state being to remove liability on any account except as it is expressed or implied by statute.—*Ensley M. Cor. Co. v. O'Rear*, 481.

Same.—The power of the board of revenue, or court of county commissioners to expend the funds of the county, is not confined strictly to claims enumerated by statute.—*Ib.* 481.

3. Boards of Revenue, etc.

Same; Boards of Revenue; Discretion.—In performing their duties under the statute in locating, erecting, repairing, removing or furnishing county buildings, bridges and roads, the commissioners or boards of revenue exercise a function that is quasi-legislative, and have a discretion that cannot be exercised for them by any other officer, or directed by any court except when their acts are fraudulent.—*Ensley M. Car. Co. v. O'Rear*, 481.

Same; Powers; Purchasing Automobile.—Under General Acts 1915, p. 573, §§ 1, 5 and 9, the commissioners court of a county has authority to purchase and maintain an automobile for use in maintaining and inspecting the roads and bridges of a county, and having issued a proper warrant therefor, such warrant should be duly registered and paid by the county treasurer as required by law.—*Ib.* 481.

COURTS.

1. Officers.

Court; Offices; Stenographer; Place of Service.—Under Acts 1909, p. 263, the judge appointing the court stenographer has no right to assign him to serve in another circuit to which the judge is assigned to preside.—*Ex parte Hill*, 462.

Same; Removal; Place of Trial.—Where the judge files charges against the stenographer of his circuit, he must try such charges at some appropriate place within that circuit, and cannot try them in another circuit to which he has been assigned to preside.—*Ib.* 462.

Clerks of Courts; Statute; Instruction.—Under § 6, Local Laws 1909, amended by Local Laws 1915, p. 62, and Local Laws 1915, p. 20, the person occupying the position of circuit clerk was still *ex officio* clerk of the law and equity court, as it is the duty of the court in construing legislative enactments with doubtful meaning to carry out the legislative intent, at the time of the approval of the amendatory act.—*Dawson v. The State*, 593.

COURTS—Continued.

2. Matters Considered on Appeal.

Courts; Opinion; Statutes.—Under § 5999, Code 1907, as amended by Acts 1915, p. 595, questions presented by charges refused to defendant on his trial for homicide which involved no new principle of law, require no separate treatment in the opinion on appeal.—*Madison v. The State*, 590.

Criminal Law; Appeal; Duty of Court.—It is the duty of the court on an appeal in a criminal case, after giving careful consideration to questions raised and insisted upon by counsel in argument, to also give careful consideration to all other questions presented by the record.—*Dawson v. The State*, 593.

COURT RULES.

40. Chan. Prac. *Smith, et al. v. Lambert*, 269.

44. Chan. Prac. *Smith, et al. v. Lambert*, 269.

34. Cir. Prac. *Morrison v. Clark*, 670.

CRIMINAL LAW.

In particular crimes, see that title.

1. Jeopardy.

Criminal Law; Former Jeopardy.—To have been put in former jeopardy a defendant must have been put to trial for the same offense, or one of the same species of offense supportable by the same evidence, or else the one crime must have been an essential ingredient of the other; the mere improper introduction on the former trial of evidence not used to support the present charge does not constitute former jeopardy.—*Brown v. City of Tuscaloosa*, 475.

Criminal Law; Former Jeopardy.—A former acquittal is no bar to a subsequent prosecution unless defendant could have been convicted under the first indictment upon proof of the facts averred in the second.—*Ib.* 475.

Same; Pleading.—Where each of defendant's special pleas of former jeopardy averred that he had been formally put in jeopardy, and tried for the same offense now charged, he was not entitled to a discharge on the ground that though the pleas were insufficient in their averments of fact, yet the evidence sustained them as framed, and hence defendant was entitled to judgment.—*Ib.* 475.

2. Record and Contents.

Appeal and Error; Review; Record; Instructions.—In the absence of a bill of exceptions the appellate courts cannot intelligently review charges in writing requested by either party, although the charges are set out in the record proper.—*Paitry v. The State*, 598.

Same; Transcript; Contents.—Where no question was raised before the trial court as to the order of the court for the special venire, or as fixing the day for the trial of defendant, the transcript on appeal should not contain such matters. (§ 6256, Code 1907, as amended by Acts 1915, p. 708.)—*Ib.* 598.

3. Oral Instructions.

Criminal Law; Oral Instructions.—Where the court had instructed the jury as to each matter requested by defendant in writing, and defendant had not requested fuller or more specific instructions in writing, the refusal of the trial court to give oral instructions requested by defendant is not reviewable.—*Oldacre v. The State*, 690.

CROSS BILL.

See Equity, § 1-d.

CUSTOM AND USAGE.

Custom and Usage; Application; Knowledge of Parties.—A prevailing usage of trade, however general, cannot be presumed to have been in the contemplation of the parties so as to control or vary the ordinary legal implication of their agreement unless it is actually known to them, or has prevailed for so long a time that their knowledge of it may be reasonably presumed.—*Cole Motor C. Co. v. Tebault*, 382.

Same; Evidence.—Itemized statements submitted to plaintiff by defendant containing no suggestion of a custom, there being no evidence that the usage relied on by defendant was existent prior to the date of the contract, plaintiff having testified to a diametrically opposite custom, was insufficient to warrant submission to the jury of the existence of such a custom or usage relied on by defendant.—*Ib.* 382.

DAMAGES.

In particular actions, see that title.

1. Elements.

Damages; Objection.—The question of the recoverability of elements of damages claimed are properly raised by objections to evidence, or by instruction, or by motion to strike, rather than by plea or demurrer.—*W. U. Tel. Co. v. Favish*, 4.

Damages; Injury to Automobile.—Where there was no evidence as to the value of the loss of the use of an automobile, the measure of damages for its injury was the difference in its value just before and just after the injury.—*B. R. L. & P. Co. v. Sprague*, 148

Damages; Show; Instructions.—The word "show" is equivalent to the words "reasonably satisfied" in instructing the jury as to damages which the evidence tended to show.—*B. R. L. & P. Co. v. Cohill*, 278.

2. Permanent Injury.

Damages; Permanent Injury; Jury Question.—Where plaintiff had suffered an injury that according to every reasonable probability would continue throughout the remainder of his life, the evidence tending to show that he was less perfect nine months after the injury, that he complained of pain, that two of his ribs had been broken, etc., it was for the jury to determine whether plaintiff had been permanently injured.—*A. G. S. R. R. Co. v. Taylor*, 37.

Same.—Where a railroad is liable for the permanent injuries of its servants, the damnifying consequences resulting from such injuries are of the element of recoverable damages.—*Ib.* 31.

Same.—Even an entire absence of data from which to determine the amount of damages to a railroad employee from permanent injuries in service will not deprive him of his right to recover nominal damages.—*Ib.* 37.

Same; Instruction.—A charge that if the jury were reasonably satisfied from the evidence that plaintiff was permanently injured as alleged, as a proximate consequence of the negligence complained of, they might award him such sum as would reasonably compensate him for such permanent injury, was proper, as advising the jury on the hypothesis that there was evidence warranting compensatory damages, for permanent injury; the plaintiff having been before the jury, and there being evidence tending to show a decrease in his earning capacity indicated in the reduction of wages received by him after his injury, although the mortality tables were not introduced.—*Ib.* 37.

3. Mitigation.

Damages; Mitigation.—Matter in mitigation of damages is admissible under the general issue.—*Peoples Shoe Co. v. Skally*, 349.

DAMAGES—Continued.**4. Liquidated.**

Damages; Liquidated; Penalty.—Under a contract of sale for a dry kiln, a provision that a failure of the purchaser to return the apparatus within ten days after a stipulated test, if unsatisfactory, will subject him to the payment of the purchase price as liquidated damages, examined and held to impose a penalty.—*Walsh Mfg. Co. v. W. T. Smith L. Co.*, 371.

5. Set-off and Counter Claim.

Damages; Contract to Transfer Insurance; Breach.—Where plaintiff sued defendant on a promissory note given for the sale of real estate, and defendant set up as a counter claim a breach of contract to transfer a fire insurance policy on the property sold, and the house burned, defendant's damages were what could have been realized on the policy if it had been properly transferred, which was the value of the property destroyed, not to exceed the amount of the policy, and the fact that the insurance company might have declined to receive defendant as a beneficiary, was no answer thereto, where it appeared that plaintiff made no effort to assign the policy and have defendant made the beneficiary as per the agreement.—*Hackett v. Cash*, 403.

Same; Set off and Counter Claim; Pleading.—Where defendant set up recoupment as for breach of a contract by plaintiff to transfer a fire insurance policy, proof by defendant of the contract and its breach, the destruction of the property insured and the policy, met the burden of proof, and made out a prima facie case as to damages.—*Ib.* 403.

Same.—After defendant had made out such a prima facie case the burden passed to plaintiff to show that the policy could not have been enforced if he had complied with his contract to properly transfer it, by showing why and wherein it could not be enforced.—*Ib.* 403.

Damages; Contract to Transfer Fire Policy; Pro Rata Clause.—Where defendant set up counter claim for breach of contract to transfer a fire insurance policy, his damages could not be scaled, upon the pro rata clause in the policy in the proportion the policy bore to another policy, in which defendant did not participate.—*Ib.* 403.

6. Breach of Contract.

Damages; Breach of Contract; Measure.—Where plaintiff was prevented from performing his contract to transport certain lumber because of defendant's breach of collateral agreements, plaintiff may recover the difference between the agreed price and the reasonable cost of the performance.—*Doran & Co. v. Gilreath*, 377.

DEATH ACTION.

Common Law; Applicability; Statutory Remedy.—While the action for the death of plaintiff's minor son was brought under the homicide act (§ 2485, Code 1907), yet it is founded on defendant's common law wrong in employing a minor at a hazardous work, without the consent of the parent, the common law principle governs, and the scope and policy of the prohibitive statute are without application.—*Garrett v. L. & N. R. R. Co.*, 52.

DEEDS.**See Acknowledgments.**

Deeds; Separate Writings; Construction.—Whether or not a supplemental writing not referred to nor identified in an executed deed can be offered and received in evidence as a part of the deed, must depend upon the following considerations: 1. It must be written contemporaneously with the deed by the grantor or his draughtsman; 2. It must be physically before the grantor when he executes the deed; 3. It must be delivered to the grantee

DEEDS—Continued.

or his agent, along with and as a part of the deed; 4. It must not contradict any of the express terms of the agreement; and 5. Upon its face, it must be continuous, coherent and consistent with that part of the deed, which it purports to supplement; that is, there must be internal evidence of the identity and unity of the two items as constituting a single transaction.—*Kyle v. Jordan*, 509.

Same.—The supplementary writing in this case contradicting the deed both as to parties and consideration, was improperly received in evidence as a part of the deed.—*Ib.* 509.

Same.—While the rule is not absolute that a deed and a supplemental paper, claimed to be a part of the deed, shall indicate a reference to each other on their face, and in some cases parol evidence of contemporaneous facts may be admissible to show their connection, yet to allow such proof, there must be internal evidence of the identity and unity of writing, as constituting a single transaction.—*Ib.* 509.

Deeds; Presumption.—Where the official certificate of the acknowledgment of a conveyance conforms substantially to the statute, it is presumed to be true, unless the execution is denied by a sworn plea, and authorizes the conveyance to be read in evidence.—*Sulzby v. Palmer*, 645.

Same; Delivery; Proof.—Where a purported deed is shown to have been signed by the grantor, acknowledged and duly certified and recorded in the county in which the land lies, and there is no proof to the contrary, such proof is sufficient proof of completed execution by delivery.—*Ib.* 645.

Same; Acknowledgment; Authorization of Officer.—Before an officer is authorized to certify the acknowledgment of a purported deed there must be in fact an acknowledgment by the grantor of the instrument signed.—*Ib.* 645.

DESCENT AND DISTRIBUTION.

Descent and Distribution; Homestead; Widow.—Where the husband owned at the time of his death a single tract of land which did not exceed in value \$2,000, the only child left by him not being a minor, the title to the land vested absolutely in the widow under § 2098, Code 1896.—*Landers v. Hayes*, 533.

Descent and Distribution; Exemptions; Widow.—The value of a decedent's land as related to the exemption of the widow should have been computed upon so much of the land as decedent owned, and not the entire tract.—*Ib.* 533.

DETINUE.

Detinue; Evidence.—Where the action was detinue for a mule, the averments that the allegations of the complaint were untrue, is a plea of the general issue, and puts in issue plaintiff's right to recover, and renders admissible, evidence negating the right of either plaintiff or defendant; hence, where the mule was claimed under a mortgage, the mortgagor could properly testify whether or not he signed the mortgage.—*Knight v. Garden*, 516.

Same; Character of Action.—The gist of the action of detinue is detention, and although the right of possession may rest wholly on the mortgage, yet the mortgage of the property alleged to have been wrongfully detained, is not the foundation of the suit.—*Ib.* 516.

Detinue; Rights of Parties; Mortgage.—Where plaintiff in detinue introduces a mortgage under which he claims, the defendant may defeat, under a plea of the general issue, such prima facie right of possession by showing an outstanding title in a third party, or proving payment, or showing that the mortgage has been rendered nugatory, or that the property was a gift, or that plaintiff is estopped to deny defendant's right of possession.—*Ib.* 516.

DISCOVERY.

Discovery; Statutory Proceeding.—Under § 4055, Code 1907, it is within the discretion of the court to select any one of the three penalties therein provided, and it is not error to refuse a motion insisting that a non suit be entered.—*Russell v. Bush*, 309.

DISMISSAL AND NONSUIT.

Dismissal and Non Suit; Setting Aside; Discretion of Court.—Where plaintiff's counsel through inadvertence asked that the action be discontinued against one of defendants who had been served and had defended on a previous trial, but before judgment or any minute entry, discovered his mistake, and entered a motion to set aside the discontinuance and allow plaintiff to proceed against such defendant, the court properly allowed the motion as the order had not passed beyond the control of the court.—*Porter, et al. v. Watkins*, 333.

Same; Discontinuance.—A discontinuance is an abandonment or chasm or interruption in proceedings occasioned by the failure of a plaintiff to continue suit regularly from time to time as he should; hence, no discontinuance was worked where the court, through inadvertence of counsel ordered an action discontinued as to a defendant, but before the order was entered, set it aside, counsel having discovered his mistake and entered the proper motion.—*Ib.* 333.

DIVORCE.

Divorce; Voluntary Abandonment; Statute.—Under subdivision 3, § 3793, Code 1907, where the husband compelled the separation by compelling the wife to leave the domicile, taking with her several minor children which she was compelled to raise, there was not a voluntary abandonment; and the fact that many years after he compelled the separation complainant went to the house established by the wife and there remained with her about a month, and then left without any reason given by her, such association with his wife did not exonerate him from the consequences of his previous conduct, and re-establish their relations in such a sense as to render her culpable in any degree.—*Dabbs v. Dabbs*, 164.

Same; Abandonment.—A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him, as by going away from their former residence and leaving her there, and not permitting her to live with him.—*Ib.* 164.

Same; Cross Bill; Alimony.—Where the decree granting the husband a divorce was reversed for a failure to prove the grounds alleged, the dismissal of the original bill did not have the effect to strike down the wife's cross bill seeking permanent alimony upon the contingency that the divorce be granted, but such cross bill will be remanded to enable the cross complainant to amend and proceed as she might be advised, she having been granted the prayer of her bill, and reference ordered to determine the amount to be allowed for alimony, and a reasonable solicitor's fee.—*Ib.* 164.

Divorce; Alimony; Amount.—Where the wife secured a divorce from her husband because of cruelty, although not entirely free from fault herself, and the husband was a strong, healthy man, forty-eight years old, successful in business, with a personal estate of \$5,000.00 or more, an award of \$1,200.00 permanent alimony, with \$100.00 attorney's fees is not excessive.—*Farrell v. Farrell*, 167.

Divorce; Appeal; Effect.—Notwithstanding a decree for alimony as an annual allowance is not final in the sense that it cannot be subsequently changed, yet where there was a final decree determining all the rights of the parties to the divorce proceedings, including the right to both permanent and temporary alimony, an appeal fully perfected by the execution of a supersedeas bond removed the entire proceeding to the appellate court, with

DIVORCE—Continued.

the exception of collateral matters not involved in the appeal, and hence mandamus will not lie to compel the chancellor to allow temporary alimony pending the appeal.—*Ex parte Farrell*, 434.

DOWER.

Dower; Estoppel; Mortgage.—The widow estopped herself as against the mortgagee to assert dower or quarantine right by joining with the heirs of the deceased husband in the execution of a mortgage on the lands of deceased husband after his death.—*Todd v. Interstate M. & B. Co.*, 169.

Dower; Sale by Widow.—Plaintiff heir was not precluded from recovery in ejectment on the theory that defendant held under a conveyance from plaintiff's mother who had a dowerable interest in the land which was assigned by her deed to defendant.—*Landers v. Hayes*, 533.

DYING DECLARATIONS.

See Homicide, § 1.

EJECTMENT.

See Adverse Possession.

Ejectment; Evidence; Conclusion.—Where it appeared that defendant held possession under a default judgment in a previous action against the present plaintiff, plaintiff, by introducing a decree of the probate court authorizing a sale of the property by the tax collector, drawn in Code form, and reciting that notice of the proceeding had been duly given, for the purpose of showing that defendant claimed under a tax title, and in anticipation of a defense therein, was not divested of a right to show that, with respect to the recited notice the decree was without the jurisdiction of the court.—*Gilliland v. Armstrong*, 513.

Ejectment; Burden of Proof.—A plaintiff in ejectment does not have to prove title beyond a reasonable doubt.—*Landers v. Hayes*, 533.

Same; Prima Facie Case.—In ejectment, proof by plaintiff that she was the only child of decedent who was the only child and sole heir of the admitted owner of the land, and who was dead, made a prima facie case; and where defendant relied upon a break in the transmission of the title by descent, that is, that it was exempt, and not subject to the law of descent and distribution, the burden was on defendant to show the exception to the rule.—*Ib.* 533.

Same; Rental Value; Evidence.—In ejectment the jury may look to the proof as to the character and value of the land in determining its rental value, there being direct evidence also as to its rental value.—*Ib.* 533.

ELECTIONS.

Elections; Registration; Time.—Under Acts 1915, p. 244, § 15, a qualified citizen must be registered as a voter between Nov. 15th and Jan. 5th following, and a registration after Jan. 5th is forbidden.—*State, ex rel. Shoemaker v. Davison*, 452.

Elections; Registration; Time.—Qualified citizens can be lawfully registered only between Nov. 15th and Jan. 5th following, and citizens registered after that time are not lawful voters, and are not entitled to be placed upon the list as such.—*State, ex rel. Newton v. Herring*, 455.

ELECTION OF REMEDIES.

Election of Remedies; Application of Principle.—A party must have actually at command two inconsistent remedies to make a case for the application of the principle by which a party concludes himself by an election between two remedies.—*Todd v. Interstate M. & B. Co.*, 169.

EMINENT DOMAIN.

Eminent Domain; Right of Parties; Compensation; Time of Payment.—Where the action was trespass *quare clausum fregit*, a plea attempting to justify under a probate decree condemning the realty to the use of a railroad for a right of way, and authorizing it to construct its line thereon, and alleging that plaintiff occupied the premises under a lease from the owner entered into after condemnation proceedings were filed, and that the trespass was only so much as was necessary to permit the use of the land for the right of way, is demurrable if compensation had not been paid for the property prior to the entry as is required by § 3882, Code 1907.—*Smith v. Jeffcoat*, 96.

Same; Computation.—The compensation to be paid by the railroad for the land condemned must be fixed by the valuation of the property as of the date of the petition for condemnation.—*Ib.* 96.

Same; Effect.—If the railroad compensates the owner for the land taken under eminent domain, its right and title vests under such payment, and relates back to the filing of petition for condemnation, as against intervening rights.—*Ib.* 96.

Same; Pendente Lite.—One who acquires a leasehold interest in land against which condemnation proceedings have been filed, takes it subject to the rights of the condemning party, and can have no compensation for the alleged interest in the land.—*Ib.* 96.

Same; Decree; Conclusiveness.—If possession of plaintiff was acquired prior to filing the condemnation proceeding, and plaintiff was not a party, he was not bound by the decree, and was not divested of whatever title he had.—*Ib.* 96.

Same; Pleading; Sufficiency.—Where plaintiff sought damages for trespass against his leasehold interest by a railroad, and the railroad sought to justify under probate decree in eminent domain, plaintiff's replications thereto were not sufficient because they failed to show the precise character, time of beginning, and duration of his leasehold interest.—*Ib.* 96.

Same; Entry.—In entering for the reasonable assertion of rights conferred by the statute, and decree of the probate court condemning land in pursuance thereof, a defendant entering as a duly authorized agent of the railroad which condemned the land, was not guilty of a trespass.—*Ib.* 96.

Eminent Domain; Right of Appeal; Estoppel.—Where the party condemning takes possession and pays the award, he is estopped from objecting to the proceedings, and waives his right of appeal.—*Russell v. Bush*, 309.

EQUITY.

In particular actions, see that title.

1. Pleading.

(a) Multifariousness.

Equity; Pleading; Multifariousness.—Where the bill sought foreclosure of two mortgages on real estate, one executed by J. and others, and the other executed later by M. and to reform certain features of the description in the mortgage, and as amended sought the cancellation of a conveyance by J. and M. to a son of M., as a condition to the enforcement of the mortgages, the purpose of the bill was single—the enforcement of complainant's lien, and was not multifarious; it not being essential in such cases that every respondent have an interest in or concern for all matters or phases of the controversy.—*Mitchell v. Cudd*, 162.

(b) Construction.

Equity; Pleading; Construction.—Where the original bill alleged foreclosure by the mortgagee, and its purchase of the two mortgaged parcels of land *en masse*, the widow and the heirs of the husband having mortgaged two tracts, one owned by the widow and the other by the heirs, the widow having joined in the mortgage only as surety, and the prayer was that the

EQUITY—Continued.

mortgagors elect whether they would affirm or disaffirm the sale under power, and, in the event of disaffirmance, that the mortgage be foreclosed by appropriate decree, thus conceding the option of the mortgagor to disaffirm, the widow's right to the benefit of a proper foreclosure of the two tracts separately under the decree of the court asserted by cross bill became fixed, and she could not be deprived thereof by the dismissal of the original bill, or its amendment withdrawing the averments of sale en masse, and withdrawing the prayer that the mortgagor be required to elect, and the substitution of a prayer that the sale be confirmed by decree.—*Todd v. Interstate M. & B. Co.*, 169.

(b½) Verification.

Equity; Pleading; Verification.—The provisions of § 5332, Code 1907, are applicable to pleadings and proceedings in equity.—*Sulzby v. Palmer*, 645.

Same.—Section 3967, Code 1907, is also applicable and extends to proceedings in equity.—*Ib.* 645.

(c) Prayer and Decree.

Equity; Pleading; Prayer; Decree.—Where the bill was against the mortgagors, a widow and the heirs of her husband, seeking to require them to elect whether they would affirm or disaffirm a sale under power, and the widow, who was surety for the heirs filed a cross bill which contained a prayer for general relief, but no prayer for relief by sale of the heir's property first for the relief of her own, it was proper for the court, upon suggestion made at bar, or ex mero motu, to decree a sale of the parcels in the order suggested by the fact that the widow was a surety.—*Todd v. Interstate M. & B. Co.*, 169

Same.—The fact that a bill in equity contains a prayer for specific relief not authorized by the facts averred does not destroy the equity of the bill where there is a prayer under which relief may be granted.—*Ib.* 169.

(d) Cross-Bill.

Equity; Cross Bill; Demurrer.—The sustaining of demurrers to portions of an answer and cross bill setting up waiver by the lessors of their right to cancel lease for non-payment of rent will not bring about a reversal where this defense was a contested issue on which evidence was taken.—*Eagle Coal Co. v. Gravlee*, 188.

(e) Admissions by.

Equity; Pleading; Admissions by General Denial.—The rule that where a material matter is charged in the bill which prima facie is within the peculiar knowledge of respondent, and the answer is only a general denial, the matter so charged must be considered as admitted, has no application where the fraud charged against respondent is manifestly within complainant's knowledge.—*Johnson v. Pinckard & Lay*, 259.

(f) Amendments.

Equity; Pleading; Amendment; Default.—Under subdivision 3, Chancery Rule 44, the fact that a decree pro confesso was entered did not dispense with notice provided for by the rules of chancery practice, and by §§ 3124-3128 and 3133, Code 1907, of a material amendment subsequently made changing the issue, the purpose of the bill, and the relief authorized; the only amendments authorized by Rule 44 being those applied for at the hearing.—*Smith, et al. v. Lambert*, 269.

Equity; Pleading; Amendment.—Where no time is specified by the chancellor or the register, the entry on the register's order book does not suffice as notice of the amendment under § 3133, Code 1907.—*Ib.* 269.

EQUITY—Continued.**2. Laches and Limitations.**

Equity; Laches; Prejudice.—Mere delay which works no disadvantage to another and does not change circumstances in such sense that there can no longer be a safe determination of the controversy will not bar a complainant's right or remedy.—*Waddail v. Vassar*, 184.

Same; Statute of Limitation.—Statutes of limitation do not bind the courts of equity where laches is invoked, unless there has been legal adverse possession.—*Ib.* 184.

3. Grounds for Interposition.**(a) Multiplicity of Suits.**

Equity; Ground; Multiplicity of Suits.—In order for a bill filed on the sole ground of preventing a multiplicity of suits to contain equity, it must show a community of interests in the subject matter of the several suits in which the several litigants are interested and a mere community of interests in the questions of law or fact involved is not sufficient.—*Aetna Ins. Co. v. Hann*, 234.

ESTOPPEL.

See Dower; Homestead; Judgment; Insurance; Eminent Domain.

1. Inconsistent Position.

Estoppel; Judicial Position; Inconsistent Position.—In order to come within the rule that a party who obtained or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another aspect in a suit founded upon the same subject matter, the election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded.—*Todd v. Interstate M. & B. Co.*, 169.

Estoppel; Inconsistent Position.—In such a case the insured was not estopped from suing on his policies because he had sued a third party for negligence in allowing her wall to fall upon his property and destroy it, as there was no inconsistency in charging such third party with negligence in constructing her wall, and in alleging that insured's property burned while covered by the policy sued on.—*Aetna Ins. Co. v. Hann*, 234.

EVIDENCE.

In particular actions or crimes, see that title.

1. Varying Writing.

Evidence; Varying Writing.—Where the written lease deals with the subject of fixtures, it cannot be varied by an oral agreement as to the fixtures.—*Middleton v. Ala. Power Co.*, 1.

Same; Similar Evidence.—Where the lease did not provide what was to become of houses erected by the lessee on the land after the termination of the lease, and the lessee introduced evidence tending to show that such houses were trade fixtures, the lessor could show an agreement that the houses were not removable.—*Ib.* 1.

2. Expressions of Pain, etc.

Evidence; Statement of Injured; Expressions.—Expressions of pain, together with the locality, nature, extent and character of it, are usually admissible in an action for damages for personal injuries; but the rule does not include declarations as to the cause of pain or narrations of past conditions. Such declarations can be proven by anyone who heard them.—*B. R. L. & P. Co. v. Gray*, 42.

Same.—While it might be error to permit a person to testify as to what he said or did indicative of pain, it is proper for him to testify whether or not he suffered pain.—*Ib.* 42.

EVIDENCE—Continued.

3. Declaration of Agent.

Evidence; Declaration of Agent; Res Gestae.—An agent cannot bind his principal by admissions or declarations relating to bygone transactions; hence, statements made by those in charge of a train which ran down plaintiff's intestate, made some time after the accident, are not part of the res gestae and are not admissible.—*So. Ry. Co. v. Fricks*, 61.

Evidence; Declaration of Agents; Corporations.—Declarations of agents of a corporation are not competent evidence against a principal, unless made while in the discharge of their duties in and about the particular transaction, and within the scope of their authority, so as to constitute a part of the res gestae.—*Meador & Son v. Standard Oil Co.*, 365.

Same; Breach of Warranty; Res Gestae.—Where the action was by a corporation for the price of gasoline, and the defense was breach of warranty as to quality, declarations of agents of the corporation made subsequent to the sale are not part of the res gestae and are inadmissible.—*Ib.* 365.

Evidence; Hearsay; Declaration of Agent.—Where the action was against a bank to recover for a deposit alleged to have been made, where the deposit was denied, evidence of a statement by the cashier was not admissible since the declaration did not relate to a matter in the course of the cashier's duty, but was merely narrative of past events, and was not binding on the principal of the bank; the question at issue being not the title of the bank to the money, but whether or not the deposit was made.—*Bank of Phoenix City v. Taylor*, 665.

Same.—In such case, evidence that the cashier stated to another witness that Phelps made the deposit for his own benefit, and not for the benefit of plaintiff, was inadmissible.—*Ib.* 665.

4. Expert and Opinion.

Evidence; Opinion.—Where a witness had given special attention to tracking automobiles by the marks of their tires, the admission of his opinion as to the identity of an automobile which he tracked was not erroneous.—*Beatty v. Palmer*, 67.

Evidence; Expert; Discretion.—The examination of a physician testifying as an expert relative to personal injuries alleged to have been received, was necessarily largely within the discretion of the trial court.—*L. & N. R. Co. v. Lovell*, 94.

Same; Qualification.—A general knowledge of the department to which the specialty belongs is sufficient to qualify a witness to testify thereto, and the sufficiency of a witness's knowledge of such subject to qualify him to speak as an expert in the matter is addressed to the sound discretion of the trial court.—*Ib.* 94.

Evidence; Opinion.—Where the question was whether in witness's opinion plaintiff's car ran into defendant or vice versa, it was properly excluded as being the mere opinion of the witness.—*Ray v. Brannan*, 113.

Evidence; Competency.—Where plaintiff had testified that steam was coming from the cylinder cock, and the witness had explained how the steam escaped through such cylinder cock, and there was evidence from which the jury might infer that the engineer knew of plaintiff's nearness and peril, the witness was properly allowed to answer the hypothetical question if an engine was running along a railroad parallel with the highway, and on meeting a party coming in the opposite direction the cylinder cocks were open and the steam escaping out on the road, how long would it take the engineer to cut off steam until the engine had passed.—*L. & N. R. Co. v. Jenkins*, 136.

Same; Opinion.—Where the action was upon a fraternal benefit certificate, defended on the theory that insured committed suicide, a statement

EVIDENCE—Continued.

by a physician that insured committed suicide was a statement as to the material facts and inquiries and not competent as evidence.—*Sovereign Camp W. O. W. v. Ward*, 327.

Evidence; Opinion; Handwriting.—Where the action was ejectment and was defended on the theory that plaintiff had executed to defendant a deed to the land, which the plaintiff asserted was forged, it was not error to refuse to allow defendant to prove the genuineness of the signature to other papers by a witness to the deed, for the purpose of laying a predicate for the introduction of expert testimony, it not appearing that the other papers were material to the controversy, or that they were in evidence.—*Qualls v. Qualls*, 524.

Same; Opinion; Value.—Value may be proven by a non expert, and the opinion of a witness who knew the land concerning its rental value, was not objectionable.—*Landers v. Hayes*, 533.

Evidence; Expert.—Where a witness testified that he received and graded the cotton for defendant, and that cotton standing as did the cotton in question would lose as indicated, plaintiff was properly permitted to cross examine such witness, and ask as to his experience as to such losses of cotton in the time he had been engaged in the business, since one who has been engaged in the cotton business for 25 or 30 years may tell of general depreciation in weight as a matter of fact.—*Georgia Cotton Co. v. Lee*, 599.

Evidence; Opinion; Value.—A non expert may give an opinion as to value.—*Ala. G. S. R. R. Co. v. Loveman C. Co.*, 683.

Same; Amount of Insurance.—Where the action was against a railroad for the destruction of property by fire, it is not proper to permit evidence as to the amount of insurance on the burned property, since it could not properly tend to establish the value of the property.—*Ib.* 683.

5. Matters Introduced by Other Party.

Evidence; Matters Introduced by Other Parties.—Where defendant set up a release from liability negotiated by an agent of an indemnity company in which she was insured, she could not complain that plaintiff's attorney inquired if she was insured in such company, as she had opened up that issue herself.—*Beatty v. Palmer*, 67.

Same; Admission Because of Other Evidence.—Irrelevant, incompetent or illegal evidence may be admitted to rebut evidence of like character; and while a hearsay declaration may be rebutted by evidence of a similar nature, the rebutting evidence must be directed, not to the ultimate facts, but to the hearsay declaration.—*Bank of Phoenix City v. Taylor*, 665.

6. Res Gestae.

Evidence; Res Gestae.—Protest made by plaintiff to the flagman of the train after alighting from the train was not part of the *res gestae*, and was properly excluded.—*Franklin v. So. Ry. Co.*, 118.

7. Documentary.

Evidence; Documentary; Failure to Produce.—Under § 4058, Code 1907, a non suit cannot be properly rendered against plaintiff for a failure to produce a letter where no notice to produce was given, and it appeared that he had destroyed the letter even though it was done to avoid the necessity of producing it, as such relief can only be granted when the document, to produce which the notice was given, was in court or in the possession of one of the parties before the court.—*Russell v. Bush*, 309.

Evidence; Presumption; Destruction of Evidence.—Where it appeared that plaintiff intentionally destroyed a letter concerning which he was interrogated, there was a strong presumption that its contents were detrimental to his cause, and he cannot introduce secondary evidence of its contents to rebut such presumption.—*Ib.* 309.

EVIDENCE—Continued.

Evidence; Letters; Presumption.—Where a letter is mailed with postage prepaid and properly addressed, there is a presumption that it was duly received by the addressee, but this presumption is rebuttable.—*Holmes v. Bloch*, 322.

Evidence; Documentary.—Daily reports made in the regular course of business in the nature of original entries are admissible in evidence and are prima facie correct.—*Ex parte Barrett Bros. S. Co.*, 655.

8. Secondary.

Same; Secondary; Materiality.—Where plaintiff intentionally destroyed a letter to avoid producing it in court, claiming that it contained private matters not related to the case, it was error for the court to sustain objection to the question as to the contents of the letter, so as to require plaintiff to state only so much of the contents as related to the issue on trial, as that left to the witness the determination as to the materiality of the evidence.—*Russell v. Bush*, 309.

Evidence; Secondary; Preliminary Question.—It was not error to overrule objection to a question asked plaintiff as a witness whether he had made a copy of a letter which he destroyed to avoid producing it in court.—*Ib.* 309.

Evidence; Secondary; Notice to Produce.—Where the notice to produce a document given to the adversary party as required by § 4058, Code 1907, did not give such party sufficient time to procure it from where it had been sent, secondary evidence of the contents of such document was not admissible.—*Sovereign Camp W. O. W. v. Ward*, 327.

Same; Secondary; Proof of Loss.—Where the physician testified that he took a note from the clothing of deceased-insured and gave the note to another witness, and the other witness testified that he had laid it aside and had not seen it since, this was sufficient to authorize the admission of secondary evidence of the contents of the note.—*Ib.* 327.

Evidence; Secondary; Proof of Loss.—Every reasonable effort which might have resulted in the production of a missing paper must be shown to have been made without avail before secondary evidence of the contents thereof can be received.—*Porter, et al. v. Watkins*, 333.

Evidence; Secondary; Collateral Matter.—Where the suit was for the difference in the price of cotton billed out at under weight, and at lower than true grade, the draft on the defendant given for the price of the cotton by the party who was acting as agent for defendant was collateral to the issues of under weight and under grading, and its production in evidence was not necessary.—*Georgia Cotton Co. v. Lee*, 599.

9. Hearsay.

Evidence; Hearsay.—A statement by a witness: "they said he died from taking carbolic acid" was hearsay and properly excluded.—*Sovereign Camp W. O. W. v. Ward*, 327.

10. Facts or Conclusions.

Evidence; Facts or Conclusions; Agency.—A witness can give his opinion only in exceptional cases, and then only when he has knowledge to qualify him to some extent as an expert; hence, in an action for the price of a carload of beer, the opinion or conclusion of the defendant, that a certain person was the agent of the plaintiff, was properly excluded.—*Colley v. Atlanta B. & I. Co.*, 374.

Evidence; Collective Facts.—A witness in a position to know may testify that a bank suspended business, without stating the facts on which he based his statement of the collective facts, as the party objecting has the

EVIDENCE—Continued.

privilege of cross examining as to the subsidiary facts.—*Bank of Phoenix City v. Taylor*, 665.

11. Pedigree and Age.

Evidence; Hearsay; Pedigree.—Hearsay evidence is always admissible to prove pedigree, that term embracing not only questions of descent and relationship, but also the particular facts of birth, marriage and death, and the time when these events may have happened.—*Landers v. Hayes*, 533.

Same.—Such declarations made by members of a family, admissible on matters of pedigree, whether in writing or orally, should be confined to some members of the family, as distinguished from a general rumor or neighborhood reputation.—*Ib.* 533.

Same; Predicate.—As a predicate for the admission of hearsay evidence of members of a family as to matters of pedigree, it must appear that the declarant had died since making his declaration.—*Ib.* 533.

Same; Age.—Age may be proven by the testimony of a person whose age is in question, and the fact that his knowledge was derived from his parents or from family reputation, does not render his testimony inadmissible, such being primary and not secondary evidence.—*Ib.* 533.

Same.—Where the age of plaintiff's deceased father was a material issue, proof of the statement made by the father as to his age, all being made before suit brought, was admissible.—*Ib.* 533.

Same.—Declarations of a person as to his age, affecting favorably his own interest, or that of his estate in an existing controversy, are inadmissible, although he has since died, not under the hearsay rule, but because such declarations are self serving.—*Ib.* 533.

Evidence; Hearsay; Age.—Where the age of plaintiff's father was a material issue, the fixing of the date of the father's marriage and the date of the death of the father's father was admissible in connection with statements made by the father to his wife, as to his age at the time of these events.—*Ib.* 533.

12. Handwriting.

Evidence; Handwriting.—Where the execution of the mortgage and note was denied by sworn plea, the admission in evidence, over objection, of a genuine specimen of respondent's handwriting for the purpose of comparison with the signature of the note and mortgage, was erroneous, as a comparison of handwriting may not be instituted between a writing in question and genuine extraneous papers, whether the comparison is to be by the jury trying the case, or through the expression of opinion by an expert.—*Sulzby v. Palmer*, 645.

EXECUTIONS.

Execution; Relief; Statutory Remedy.—Under § 3256, Code 1907, relief is to be administered on those equitable principles which apply to proceedings under supersedeas, or the common law writ of *audita querela*, and the movant is entitled to relief whenever plaintiff has no just reason to enforce his process.—*Wallace v. F. W. Cook Brew. Co.*, 245.

Same; Abuse of Process; Remedy.—Where the authorized agent of a plaintiff obtaining a default judgment against complainant has marked the record of the judgment satisfied, thereby cancelling it, and there is nothing due on the judgment, complainant is entitled to relief not by bill in equity to enjoin the enforcement of the judgment but by motion in the lower court under the provisions of § 3256, Code 1907; the Local Acts establishing the Law and Equity Court (Local Acts 1907, p. 203, § 21), providing that nothing therein should prevent the exercise of any power conferred upon the circuit court touching final judgments.—*Ib.* 245.

EXECUTION—Continued.

Same.—A bill was without equity and properly dismissed where under the averments of the bill the remedy at law was plain, adequate and complete.—*Ib.* 245.

EXECUTORS AND ADMINISTRATORS.**1. Distribution.**

Executors and Administrators; Distribution of Estate; Collateral Attack.—An order of the probate court for the sale of a decedent's land for distribution is not subject to collateral attack by an heir who was not a party to the probate proceedings.—*Lee, et al. v. Lee*, 522.

FALSE IMPRISONMENT.

False Imprisonment; Nature.—Detention of a person by another with force, or against the will of the person detained, is an imprisonment in law; and if such detention is not rightful, it is unlawful.—*C. of Ga. Ry. Co. v. Carlock*, 659.

Same; Evidence.—In an action for false imprisonment the answer of a witness that he thought plaintiff was arrested, is admissible where his subsequent testimony supports such statement.—*Ib.* 659.

FEDERAL LIABILITY ACT.

See *Commerce*, § 1.

FINES.

Fines; Disposition; Witness Fee.—Under § 6664, Code 1907, a certificate for a witness fee, signed by the foreman of the grand jury, and endorsed by the clerk of the court showing that the state failed to convict in that case, shows that the owner of the certificate was entitled to payment by the treasurer of the county; the clerk's endorsement being in compliance with § 6666, Code 1907.—*Ray v. Collins*, 478.

Same.—Under § 6888, Code 1907, the fines paid by persons convicted of misdemeanor became a part of the fine and forfeiture fund, and could be devoted to paying fees of state witnesses, notwithstanding the provisions of *Local Acts* 1911, p. 91, and the contention of the treasurer that the fines paid by misdemeanor convicts should be devoted to the public roads.—*Ib.* 478.

FIRES.

See *Negligence*, § 3; *Railroads*, § 4.

FIXTURES.

Fixtures; Houses.—Unless the builder reserves the right of removal, houses erected upon the land of another prima facie become part of the realty.—*Middleton v. Ala. Power Co.*, 1.

Same; Trade Fixtures.—Where improvements consist of what are termed "trade fixtures," they do not become prima facie part of the land on which they stand.—*Ib.* 1.

Same; Agreement.—By contract the parties may make trade fixtures a part of the land on which they stand.—*Ib.* 1.

Same; Right of Removal.—A reservation of a fixture, or the right to remove it at the expiration of the lease, may be made by oral agreement.—*Ib.* 1.

FRAUD.

Frauds; Presumption and Burden of Proof.—The law does not presume fraud, and when the charge of fraud is made, it must be established by the evidence before relief can be had.—*Wallace v. Crosthwaite*, 356.

FRAUDS; STATUTE OF.

1. As to Land.

Frauds; Statute of; Demurrer.—Where that fact does not appear upon the face of the pleading, a bill alleging a partnership in land and praying for an accounting is not rendered demurrable on the ground that the partnership contract was not in writing as required by the statute of frauds.—*Reilly v. Woolbert*, 191.

Same; Interest in Lands; Partnership.—An oral agreement for the purchase of an interest in the partnership consisting wholly or partly of land, is in violation of the statute of frauds as it involves title to real estate.—*Ib.* 191.

Frauds; Statute; Agreement to Accept Shares of Stock.—An agreement between a mortgagor and a mortgagee that upon the sale of the mortgaged property, the mortgagee will accept in payment of the debt shares of stock which are to be received by the mortgagor in payment of the purchase price of the land, is not within the statute of frauds, since a release would result by operation of law.—*McKenzie v. Stewart*, 241.

Same; Note Secured by Mortgage; Modification.—A note secured by a mortgage on real estate is a contract for the payment of money, and its terms may be modified by a subsequent oral agreement supported by a sufficient consideration.—*Ib.* 241.

Frauds; Statute of; Real Property.—The great controlling purpose of the statute of frauds as to real estate is the requisition of written evidence as to all contracts for the sale of land.—*Kyle v. Jordan*, 509.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyance; Bill; Parties.—In a bill to set aside a fraudulent conveyance, one who has joined with respondent in the execution of a note on which complainant is a creditor, and whose liability is both joint and several, is not a necessary party.—*Moore, et al. v. Altom*, 158.

Same; Validity as Between Original Parties.—A conveyance claimed to be fraudulent by a creditor of the grantor cannot for that reason be annulled as between the parties to it.—*Ib.* 158.

Same; Disposition of Proceeds; Surplus.—Where land is conveyed in fraud of creditors, and is sold to satisfy their claim, the remainder of the fund produced by the sale goes to the grantee in the fraudulent conveyance or those claiming under him.—*Ib.* 158.

Same; Parties; Wife of Grantor.—It is not necessary to join as respondent to a bill to set aside a conveyance as fraudulent, the wife of the grantor who is charged with no fraud, although she joined in the conveyance.—*Ib.* 158.

Same; Pleading; Bill; Presentation of Note.—In a bill to set aside a fraudulent conveyance in order to enforce a note, it need not be alleged that such note was presented for payment at the time and place where payable, nor to deny that funds awaited it there, since this is defensive matter.

Fraudulent Conveyances; Remedies; Order of Sale.—If the complainant is entitled to a decree on the merits, and it appears that the land may be sold in parcels without jeopardizing the full satisfaction of complainant's demand, and that such course may avoid an unnecessary sacrifice of the land, the court may order the sale in parcels in its discretion.—*Ib.* 158.

Fraudulent Conveyance; Reservation of Benefit; Right of Creditors.—Under § 4287, Code 1907, a mortgage on a stock of goods to secure an existing indebtedness, as well as future indebtedness, with the parol agreement that the mortgagor should retain possession of his stock of goods, and carry on the business under his own name, and sell the goods and keep the stock insured, was such a reservation of benefit to the mortgagor, as rendered the mortgage void as against creditors of the mortgagor.—*Beasley, et al. v. Burroughs & Taylor Co.*, 397.

FRAUDULENT CONVEYANCES—Continued.

Same.—The mere fact that a mortgagor is employed by the mortgagee, before or after the execution of the mortgage, and is authorized as the agent of the mortgagee to sell the goods in the regular course of trade, would not be such a reservation of benefit to the mortgagor as to render the mortgage void under § 4287, Code 1907.—*Ib.* 397.

HOMESTEAD.

Homestead; Estoppel; Mortgage.—Under § 4197, Code 1907, the widow estopped herself to assert her homestead rights in the property, as against the mortgagee by joining with the heirs of her deceased husband in the execution of the mortgage on the lands after his death.—*Todd v. Interstate M. & B. Co.*, 169.

HOMICIDE.

1. Evidence.

Homicide; Dying Declarations; Admissibility.—Where the deceased survived the shooting about eighteen hours, and when conscious that he could not recover, made statements to the effect that defendant had shot him, and in response to questions propounded when he realized that he was near death, made statements while defendant was present, that defendant had shot him, such statements were admissible as dying declarations.—*Martin v. The State*, 584.

Same.—In such a case the substance of decedent's statement designating defendant as his assailant, was admissible.—*Ib.* 584.

2. Instructions.

(a) Self Defense.

Homicide; Self Defense.—Charges based on the theory of self defense which premit the duty to retreat are faulty.—*Madison v. The State*, 590.

Same; Place.—The fact that at the time of the shooting defendant was in a public road, made no change in the rule as to his duty to retreat.—*Ib.* 590.

Same; Freedom from Fault.—Where it clearly appeared that the person slain made a sudden and entirely unprovoked attack upon the defendant with a deadly weapon, and was in the act of effecting upon defendant such murderous purpose, no duty to retreat rested on defendant.—*Ib.* 590.

Same.—Charges upon self defense which failed to hypothesize defendant's freedom from fault in bringing on the difficulty, were properly refused.—*Ib.* 590.

Same; Abandonment of Difficulty.—Where the evidence showed that deceased and defendant had some dispute two hours previous to the fatal encounter in which deceased threatened an assault upon defendant, and defendant thereupon went to his home and subsequently and voluntarily returned and called deceased out of the house, it afforded no ground for instructions on the theory that defendant abandoned the difficulty.—*Ib.* 590.

Homicide; Self Defense.—The fact that the killing of deceased was made necessary to enable defendant to recover some money which deceased had taken from him, could not justify the killing.—*Oldacre v. The State*, 690.

Same; Instructions.—An instruction on self defense which fails to negative the fault of defendant in the matter, or that defendant used any more force or violence than was necessary to obtain his property from deceased, or to defend himself against deceased, was properly refused.—*Ib.* 690.

Same; Provoking Difficulty.—A defendant cannot justify the killing of another by showing the necessity therefor produced by his own wrongful act.—*Ib.* 690.

HOMICIDE—Continued.

Same; Retreat.—The right to kill in self defense does not arise until defendant has offered or attempted to retreat, or to decline the combat if there is open to him a reasonably safe way of retreat, and which will not increase his danger.—*Ib.* 690.

HUSBAND AND WIFE.**1. Separate Maintenance.**

Husband and Wife; Separate Maintenance; Evidence.—The evidence examined and held sufficient to warrant a decree for a reasonable allowance to the wife for a separate maintenance.—*Cook v. Cook*, 180.

2. Wife as Surety.

Husband and Wife; Debt of Husband; Wife's Security.—The evidence examined and it is held to support a finding that the mortgage in question was not executed by the wife to secure a debt of the husband, and hence, that it was not void as in violation of § 4497, Code 1907.—*Griffin v. Dawsey*, 218.

3. Loss of Service, etc.

Husband and Wife; Action by Husband; Loss of Service.—A husband may recover for the loss of the services of his wife where such loss proximately resulted from injuries wrongfully inflicted upon her.—*Morrison v. Clark*, 670.

INDICTMENT AND INFORMATION.

Indictment and Information; Variance; Crime.—A crime charged as of one date may be established by proof of its occurrence on another date, but the crime proved must antedate the charge on which a defendant is being tried, otherwise there is a fatal variance.—*Brown v. City of Tuscaloosa*, 475.

Same; Evidence; Time.—Where the prosecution is for crime, evidence of an offense committed by defendant later than the charge upon which defendant is being tried is inadmissible and will not support a conviction.—*Ib.* 475.

INFANTS.**1. Notice to.**

Infants; Amendment; Notice.—Under subdivision 1, Chancery Rule 44, where the bill was against the widow, minor children of her deceased husband, and the administrator of his estate, and the record fails to show the actual presence of the minors in court in person, by solicitor, or by guardian ad litem at the time of the allowance of the amendment to the bill, the rendition of a final decree thereon without notice to the minors was reversible error as to them.—*Smith, et al. v. Lambert*, 269.

INJUNCTION.

Injunction; Actions at Law; Ground.—Where the bill was by a number of insurance companies to enjoin the insured from his prosecution of several actions at law on his policy, pending the appeal of a judgment of one primarily liable for the loss, it was not maintainable on the theory that it would prevent a multiplicity of suits, as there was but one suit against each insurer; and the fact that each of the policies provided for the apportionment of the loss among the several insurers did not constitute such a community of interests in such a matter as to give the bill equity on the ground of preventing a multiplicity of suits.—*Aetna Ins. Co. v. Hann*, 234.

INSPECTION.

Inspection; Laws; Purpose.—Subdivision 31, § 25, Local Acts 1898-9, p. 1415, Birmingham City Charter, and §§ 1279-1295, Code 1907, provide for only those inspections having the ordinary protective purpose against fraud or imposition in commercial dealings, or against the impairment of the reputation of an article manufactured for exportation.—*Ward, et al. v. Markstein*, 209.

INSURANCE.

See Damages, § 5.

1. Estoppel and Subrogation.

Insurance; Estoppel.—Where a party whose property was destroyed by the negligence of a third party in constructing a wall which fell upon his property, has recovered against such third party, his recovery diminishes his loss pro tanto, and his right to recover against insurer would be limited to the remainder only of the loss covered by the property.—*Aetna Ins. Co. v. Hann*, 234.

Same; Subrogation.—In such a case the insured, receiving the whole loss from the insurer, would hold his claim against such third party in trust for the insurer, and might sue therefor in his own name for its use, or the insurer might sue in its own name for its own use.—*Ib.* 234.

Same; Parties Secondarily Liable.—Before subrogation could be decreed in favor of an insurer as against one primarily liable for the loss, the insurer must have paid the insured his loss according to his policy, and thus satisfied the insured's demand against the wrongdoer.—*Ib.* 234.

2. Life.

Insurance; Life; Breach of Warranty.—Under § 4572, it is not enough for the plea to allege that the assured falsely warranted that he had not been attended by a physician for a serious disease for a given period, as neither of the statutory conditions was thereby fulfilled.—*Metropolitan L. Ins. Co. v. Goodman*, 304.

Same; Misrepresentation.—The provision of § 4572, Code 1907, must be given a liberal construction in favor of the insured.—*Ib.* 304.

Same; Defenses.—A plea alleging that the insured fraudulently suppressed the fact that he had been attended by a physician for a serious disease, although good under § 4299, Code 1907, is demurrable where it fails to allege intent to deceive, as required by § 4572, Code 1907.—*Ib.* 304.

Insurance; Life; Complaint.—Where the action is on a life insurance contract, the complaint must show that the liability accrued within the period covered by the policy.—*Sovereign Camp W. O. W. v. Ward*, 327.

3. Fraternal.

Same; Fraternal Benefits; Complaint.—Where the complaint claimed a sum due on a certificate of insurance issued by fraternal benefit association on a certain date by which it agreed to pay to plaintiff a sum certain on the death of the insured, and averred that the insured died on a certain date, which was within eight months of the issuance of the certificate, that defendant had had notice of his death, and that the certificate was the property of plaintiff it was not subject to demurrer.—*Sovereign Camp W. O. W. v. Ward*, 327.

Insurance; Fraternal Benefit; Evidence.—Evidence that deceased was addicted to the drink habit just preceding his death, was competent in connection with evidence as to his efforts to abstain therefrom and his purpose to do so, the defense being that insured committed suicide.—*Ib.* 327.

INSURANCE—Continued.

Same.—Under the evidence in this case it was a jury question whether insured committed suicide or not.—*Ib.* 327.

4. Fire.

Insurance; Fire; Payment to Mortgagee.—Where a policy of fire insurance is upon the interest of the mortgagee, and does not accrue to the benefit of the mortgagor, the insurance company has a right to pay the mortgage, and take an assignment, or to become subrogated to the rights of the mortgagee, in case there is no assignment.—*Hackett v. Cash*, 403.

Same; Payment to Mortgagee; Subrogation.—Where a policy of insurance is taken by the owner for his own benefit, but payable to the mortgagee as his interest may appear, payment to the mortgagee would extinguish the mortgage indebtedness.—*Ib.* 403.

Insurance; Fire; Additional or Other.—Where both the mortgagor and the mortgagee have separate insurance upon their respective interests, then neither policy can be said to be additional insurance with respect to the other policy; the terms "additional" and "other" as used in policies providing a forfeiture, means the same insurable interest in the property.—*Ib.* 403.

Same.—Where a policy of fire insurance permitted \$1,000 additional insurance, it could not refer to a policy to which insured is not a party, and of which he knew nothing, but meant subsequent insurance.—*Ib.* 403.

Insurance; Fire; Limitation; Waiver.—Where, at the time of the issuance of the fire insurance policy, plaintiff fully advised defendant's agent that there was a mortgage on the property, and the property was sold under foreclosure proceedings under the mortgage before the loss, the insurance company could not refuse payment under a provision in the policy that it should be void if the interest of the insured be other than unconditional and sole ownership of the property.—*Fidelity-Phoenix F. I. Co. v. Ray*, 425.

Same.—A provision in a policy that it should be void if foreclosure proceedings be commenced or notice of the foreclosure sale of the property be given with knowledge of the insured, was waived under a provision of the policy authorizing the insurance company to cancel the policy by giving five days' notice, where the insurance company failed to cancel the policy, it having knowledge that the property was advertised for sale for three weeks.—*Ib.* 425.

Agency; Authority.—An insurance company is bound by the ostensible or apparent authority of its agents; the test being his actual power as held out to the world, in the absence of knowledge of limitations thereon on the part of persons dealing with such agent.—*Ib.* 425.

Same; Forfeiture; Waiver.—By denying liability on one ground of forfeiture alone, an insurance company waives all other grounds of forfeitures or breaches of the conditions of the policy.—*Ib.* 425.

INTOXICATING LIQUORS.

Intoxicating Liquors; Ordinances; Validity.—Birmingham Ordinance No. 345C is invalid as inconsistent with the policy as to liquors declared by the legislature, Acts 1915, p. 555, notwithstanding Local Acts 1898-9, p. 1415, Acts 1909, p. 174, General Acts 1915, p. 296, and §§ 1279, 1295 and 1341, Code 1907.—*Ward v. Markstein*, 209.

JUDGES.**1. Disqualification.**

Judges; Disqualification.—Under Acts 1909, p. 263, the judge who appoints the court stenographer may personally hear and determine the charges as a basis for his removal, although sworn to by the judge himself.—*Ex parte Hill*, 462.

JUDGMENTS.

See Appeal and Error, § 4.

1. Mutuality.

Judgment; Estoppel; Requisite.—A party is not permitted in a subsequent suit to take a position conflicting with that taken by him in a former suit if such position is to the prejudice of the adverse party, but for such an estoppel to be relied upon the parties and subject matter must be the same, the point must be directly in person, and the judgment must be rendered on that point.—*Aetna Ins. Co. v. Hann*, 234.

Same; Mutuality.—Estoppels by judgment operate mutually, and a party not bound by a judgment cannot set up that another is estopped by it.—*Ib.* 234.

2. Defaults and Setting Aside.

Judgment; Default; Motion to Set Aside.—A motion, after suffering default judgment, for a new trial on the ground that the finding was contrary to the evidence, and that defendant had a meritorious defense but was prevented by surprise, accident or mistake, from making it before the court's final finding, but which fails to state any fact in support of the prayer for relief, was demurrable.—*Reed v. Hammond*, 202.

Same.—In such a case, where it did not appear that the petitioner offered to amend the motion, the court properly dismissed it.—*Ib.* 302.

Same; Setting Aside Denial.—A motion to set aside an order denying a rehearing after a default judgment, not accompanied by an offer to amend petition by sworn statement of the facts showing a good and meritorious defense to the action, was properly denied.—*Ib.* 302.

Same; Exceptions.—Under § 4145, Code 1907, on a motion to annul, vacate, or arrest a judgment, exceptions may be taken to any ruling, and a bill of exception may be signed and certified as a part of the record, and an appeal taken as in any other action.—*Hall v. First Bank of Crossville*, 627.

Same; Default Judgment; Review.—In the absence of a bill of exceptions, the evidence is presumed to support the judgment on an appeal from such judgment.—*Ib.* 627.

Same.—After motion made to annul, arrest or vacate a default judgment has been denied, on an appeal from a default judgment, no presumption need be indulged as to the correctness of the court's ruling where the record fails to show a judgment thereon.—*Ib.* 627.

Same.—Where the complaint states a substantial cause of action, and the judgment is responsive thereto, on an appeal from a default judgment, the appellant cannot complain of demurrable defects in the complaint, even though the defects be misjoinder of causes of action in the same count.—*Ib.* 627.

Same.—On a motion to annul, arrest or vacate a default judgment, the complaint will be liberally construed, and if it appears by treating all amendable defects as amended that a substantial cause of action is pleaded, the judgment will be sustained.—*Ib.* 627.

Appeal and Error; Review; Default Judgment.—Where the bill of exceptions on a motion denied to annul, arrest or vacate a default judgment on a note, does not present the evidence, such evidence is no part of the record, and cannot be reviewed.—*Ib.* 627.

Same.—Where the evidence is not presented by a bill of exceptions, the form of the note as set forth by a copy in the transcript cannot be considered, but the form of the note must be determined by the averments of the complaint on which the default judgment is rendered.—*Ib.* 627.

Appeal and Error; Review; Vacating Judgment.—In the absence of a bill of exceptions, on an appeal from the denial of a motion vacating a judgment, in passing on a motion to set aside and vacate a judgment, the trial

JUDGMENTS—Continued.

court must be presumed to have had evidence before it to justify the denial of the motion.—*Ib.* 627.

3. Motion in Arrest.

Judgment; Motion in Arrest; Grounds.—Judgments can be arrested only for defects apparent of record, and defects which are amendable will not authorize the arrest or annulment of the judgment.—*Hershey Choc. Co. v. Yates*, 657.

Same.—Under § 4143, Code 1907, mere defect in the form in the complaint or declaration must be raised by special demurrer, or other special pleading, and cannot be raised by motion in arrest of judgment.—*Ib.* 657.

4. Requisites to Support.

Judgment; Requisites.—An insufficient complaint cannot be made the predicate for a valid judgment.—*C. of Ga. Ry. Co. v. Carlock*, 659.

JURY AND JURORS.

See New Trial.

1. Qualification.

Jury; Qualifications; Interest; Membership in Order.—In an action on a fraternal benefit certificate, a member of such order has an interest which disqualifies him as a juror, upon the objection of defendant.—*Sovereign Camp W. O. W. v. Ward*, 327.

2. Trial by.

Jury; Trial; Vacation of Office.—The provisions of § 16, Local Acts 1915, p. 293, are invalid as violative of §§ 6 and 105, Constitution 1901.—*Dunn v. Dean*, 486.

LACHES.

See Equity, § 2; Trusts.

LANDLORD AND TENANT.

Landlord and Tenant; Rent; Lien; Pleading.—A bill to enforce a lessor's lien for unpaid rent need not state the date upon which the lease was forfeited, where the time of the breach is otherwise made sufficiently definite.—*Eagle Coal Co. v. Gravlee*, 188.

Landlord and Tenant; Lien; Estoppel to Assert.—When rightfully exercised a re-entry by the lessors does not estop them from filing a bill in equity to enforce their lien for unpaid rents on the improvements placed by the lessee on the leased property.—*Ib.* 188.

Same; Judgment.—In enforcing the lessor's lien on improvements on leased property the chancery court may order the improvements sold in bulk, although their value greatly exceeds the amount due; it not appearing that prejudice would result to the lessee, and such improvements being much more valuable in connection with the land.—*Ib.* 188.

Landlord and Tenant; Rent; Attachment.—It is actual and not constructive fraud which warrants attachment for the rent not due where the tenant has or is about to fraudulently dispose of his goods. (§ 4748, Code 1907.)—*Seals P. & O. Co. v. Bell, et al.*, 290.

Same; Evidence.—Evidence of an attempt to remove the tenant's goods, without the knowledge of the landlord to another city there to be mingled with other goods on which the landlord had no lien, the tenant being solvent, did not show a fraudulent disposition of the goods within the purview of § 4748, Code 1907.—*Ib.* 290.

Same.—The removal of goods under such circumstances of secreting or hiding as would show intent to deprive the landlord of his lien is a fraudulent intent authorizing attachment within § 4748, Code 1907.—*Ib.* 290.

LANDLORD AND TENANT—Continued.

Landlord and Tenant; Adverse Possession; Statutory Notice.—Adverse possession does not run in favor of a tenant at will under the owner until the tenant files a declaration with the probate judge asserting such adverse possession, as required by § 1541, Code 1896.—*Lee v. Lee*, 522.

LICENSE.

License; Invalid Tax; Recovery.—During the years 1907, 1908 and 1909, petitioner paid to the probate judge certain sums of money as a privilege tax under Acts 1907, p. 455, which was declared unconstitutional and void, and now applies for a refund under § 2411, Code 1907, which was amended by Acts special session 1909, p. 166, Aug. 25, 1909, and further amended by Act of Feb. 22, 1915, Acts 1915, p. 120, re-enacting the amended statute, with an added provision, and General Revenue Act 1915, p. 489, re-enacted the amendatory act of 1909, without reference to the original statute. Held, that neither the amendatory nor the revisory acts of 1915 altered the retrospective limit prescribed by § 2411, Code 1907, as amended, and hence, that the original limitation for money paid since Aug. 25, 1907, was ipso facto retained.—*Allgood, Aud. v. Sloss-S. S. & I. Co.*, 500.

Same; Refund; Mistake.—The provisions of § 2411, Code 1907, were intended to promote justice and equity between the taxing power and the tax payer, and to correct mistakes either of law or fact.—*Ib.* 500.

Same; Recovery; Laches.—The claim of a tax payer to recover money that was paid under an invalid license law, will be denied under common law practice if not prosecuted with reasonable diligence, although not barred by any analogous statute of limitation.—*Ib.* 500.

LOGS AND LOGGING.

1. Turpentine.

Logs and Logging; Sale of Timber; Turpentine.—The right of turpentine is not embraced in the right to cut, remove or manufacture timber.—*Yarbrough v. Stewart*, 160.

MARRIAGE.

Marriage; Presumption; Burden of Proof.—Where a woman sought to show that her marriage relations with one man were void because of an alleged slave marriage with another, in view of the slave marriage law, the burden of proof to overcome the presumption of validity of the later marriage was heavy upon her.—*Bell, et al. v. Bell, et al.*, 465.

Same; Legalizing.—The constitutional ordinances of September, 1865, legalizing marriages of freed men and women then living together as man and wife, contracted during slavery, did not legalize wrongful cohabitation, nor make marriage contracts for parties not intended by them.—*Ib.* 465.

MASTER AND SERVANT.

See Commerce, § 1.

1. Injury to Servant.

(a) Assumption of Risk.

Master and Servant; Injury to Servant; Assumption of Risk.—The defense of assumed risk cannot be availed of under the general issue, but must be made the subject matter of a special plea.—*A. G. S. R. R. Co. v. Skotzy*, 25.

Same; Assumption of Risk.—Under the evidence in this case it cannot be held as a matter of law that plaintiff assumed the risk of injury from the negligence of his superintendent.—*U. S. C. I. P. & F. Co. v. McCoy*, 45.

(b) Contributory Negligence.

Same; Contributory Negligence.—Where there was nothing to indicate that the cars on the track on which plaintiff was standing when in-

MASTER AND SERVANT—Continued.

jured, would be moved during the time he was there engaged, evidence that cars ran over plaintiff who was standing on a track adjacent to the engine on which he was working to straighten his flue auger between the wheels of his engine, was sufficient to warrant a submission to the jury of the question of contributory negligence.—*Ala. G. S. R. R. Co. v. Skotzy*, 25.

(c) Evidence and Findings.

Master and Servant; Injury to Servant; Jury Question.—Evidence that while plaintiff, a fireman, stood on an adjacent truck in order to work, another crew switched some cars with no one controlling them, and no warning signal into the cars on that track which ran over plaintiff and injured him, and that the switching foreman could have seen plaintiff or his crew, was sufficient to warrant a submission to the jury of the question of negligence.—*Ala. G. S. R. R. Co. v. Skotzy*, 25.

Master and Servant; Injury to Servant; Jury Question.—Where the evidence tended to show that the alleged defect had existed for a sufficient time to warrant the inference, either that it was known or would have been discovered by due care, it was a question for the jury whether there was negligence attributable to defendant either in the existence of a defect in the condition of the ways, works, etc., or a failure to remedy the defect, the action being under subdivision 1, § 3910, Code 1907.—*A. G. S. R. R. Co. v. Taylor*, 37.

Same.—In such an action whether the method adopted by defendant's roundhouse superintendent in bringing a car down the incline, which resulted in injury to plaintiff, was such a method as due care and reasonable precaution approves, was a question for the jury, under the evidence in this case, the action being under subdivision 2, § 3910, Code 1907.—*Ib.* 37.

Same; Jury Question.—Where the evidence was conflicting as to whether or not the trolley wire was located in a passage or escape way, it was a question for the jury whether the mine operator should have protected the trolley wire as required by rule 11, Acts 1911, p. 535.—*Robinson v. Maryland C. & C. Co.*, 604.

Same; Invited Licensee; Jury Question.—The question as to whether decedent was an invited licensee at the point where he was killed, was for the jury where the evidence was conflicting as to whether the trolley wire which shocked and killed him was located in part of a passage or escape way.—*Ib.* 604.

(d) Superintendence.

Same; Superintendents; Acts.—The evidence examined and held to warrant the conclusion that the railroad employee who directed that a car be brought down an incline in a certain manner was a superintendent within subdivision 2, § 3910, Code 1907.—*A. G. S. R. R. Co. v. Taylor*, 37.

Same; Negligence of Superintendence; Evidence.—The evidence examined and held not to sustain a verdict against defendant on the second count of the complaint.—*U. S. C. I. P. & F. Co. v. McCoy*, 45.

Same; Negligent Order of Superintendent; Evidence.—The evidence examined and held to require a submission to the jury as to whether the alleged order of the superintendent was negligent.—*Ib.* 45.

(e) Fellow Servant and Incidents.

Same; Fellow Servant.—A master is not liable for injury to a servant occasioned by the negligence of a fellow servant in the absence of any negligence in furnishing incompetent and inexperienced fellow servants.—*U. S. C. I. P. & F. Co. v. McCoy*, 45.

Same; Incompetent Servant.—In an action by a servant for injury, a single act of negligence on the part of an experienced fellow servant operating a crane on the occasion of plaintiff's injury, was not sufficient to warrant a finding that such fellow servant was unskilled or incompetent.—*Ib.* 45.

MASTER AND SERVANT—Continued.

Same; Evidence.—Where it appeared that anyone with very little training could operate the crane whose runner jammed the chain and blocks until they fell and injured plaintiff, that plaintiff, one of the common laborers, had himself operated the crane, evidence that plaintiff had complained generally to his foreman about the manner in which the crane was operated, and of complaints of its operation by persons other than the operator was inadmissible, in the absence of evidence that the operator of the crane was incompetent, as the issue was limited to the competency of the operator at the time.—*Ib.* 45.

(e) Complaints, etc.

Master and Servant; Injury to Servant; Complaint.—The count alleging that the plaintiff was employed as a machine shop helper, and was injured as a proximate consequence of the negligence of the superintendent of defendant in permitting plaintiff to be sent to work with men incapable of assisting plaintiff in the work which he was required to do; or in sending men to assist plaintiff who were inexperienced and incompetent; or in sending an insufficient number of men to assist plaintiff, stated a cause of action.—*U. S. C. I. P. & F. Co. v. McCoy*, 45.

Same.—A count alleging that plaintiff's injury was proximately caused by another employee, entrusted with superintendence, in ordering plaintiff to assist him in lowering or tightening down a steady rest under the arm of a crane, in doing which he was compelled to stand under the chains and block which were being raised by the crane runner, and that it was the duty of the superintendent to notify him that the blocks were being jammed by the runner, but that he failed to give such notice or to stop the runner before the chains and block fell upon plaintiff, stated a cause of action; and the fact that complaint alleged that the superintendent ordered plaintiff to do what he was doing at the time of the injury, did not necessarily bring the count exclusively within subdivision 3, making the master liable when the servant is injured in obeying a negligent order of a superior.—*Ib.* 45.

Same.—Subdivisions 2 and 3 of § 3910, Code 1907, cover in common the cases in which a superintendent gives a negligent order, and in such cases the complaint may be framed under either subdivision.—*Ib.* 45.

(g) Proximate Cause.

Master and Servant; Injury to Servant; Proximate Cause.—Where defendant wrongfully employed plaintiff's minor son, without her knowledge or consent, to work on a barge on the river, and the work was not essentially dangerous, and the boy appeared to be an adult, and one of the other employees on the barge pushed the boy into the river, as a joke, and the boy was drowned, the defendant's wrong in employing the boy was not the proximate cause of the death, and defendant was not liable.—*Garrett v. L. & N. R. R. Co.*, 52.

(h) Safe Place.

Master and Servant; Injury to Servant; Safe Place; Escape Way.—A drift entry of a coal mine used as a place for the track, and as a passage way for the miners in going in and out of mines, and in getting from one room to another, being the only escape way from the mine, was an escape way within the meaning of rule 11, Acts 1911, p. 535, as providing for the protection of conductors of electricity in shafts and slopes used as traveled ways and in escape ways.—*Robinson v. Maryland C. & C. Co.*, 604.

Same.—Where a track divided the entry into a coal mine, making the open space to the left of the track the passage or escape way, while the part to the right of the track over which the trolley wire ran, was not used or in-

MASTER AND SERVANT—Continued.

tended to be used as a part of the passage or escape way, rule 11, Acts 1911, p. 535, was without application to the trolley wire.—*Ib.* 604.

Same; Safe Place.—Regardless of the statute, it was the duty of a mine operator, under the common law to exercise reasonable care to see that the places which its servants were invited to use as a passage or escape way, were reasonably safe.—*Ib.* 604.

Same.—Where an entire entry to a coal mine was used as a passage way or escape way, and the part to the left of the track was not so used exclusively, it was the duty of the company operating the mine under rule 11, Acts 1911, p. 535, to protect the trolley wire running on the ride side of the entry.—*Ib.* 604.

Same.—Under such circumstances the mine operator was liable at common law for a negligent failure to keep the passage way reasonably safe for a miner who was invited to use it as a passage way, whether he was actually engaged in his duties or not at the time he was killed by an electric shock from the trolley wire located therein.—*Ib.* 604.

(i) Scope of Employment.

Same; Scope of Employment; Place of Work.—At common law, the operator of a coal mine was not liable to its servant who was killed when he had departed from the place provided for him, and had gone to a place where he had no right to be.—*Robinson v. Maryland C. & C. Co.*, 604.

Master and Servant; Injuries to Servant; Course of Employment.—If a servant voluntarily abandons the service his employment contemplates to assist another servant, and is injured while so engaged, the master is not liable.—*Republic I. & S. Co. v. Howard*, 663.

Same; Jury Question.—Under the evidence in this case it was a question for the jury whether the servant injured was injured in the course of his employment.—*Ib.* 663.

(j) Accident Unavoidable.

Master and Servant; Injury to Servant; Unavoidable Accident.—Where a servant went upon an incline to chain cars so that they would not move, while he and his gang were repairing the gearing to a drum which moved the cars by means of cables, and was injured by a fellow servant falling and catching hold of a throttle lever, which action started the engine, thus moving the cars where the servant was working, such servant could not recover, since the accident was one not reasonably to be foreseen by the employer.—*Wheeler v. Standard Steel Co.*, 634.

2. Injury to Third Persons.**(a) Tort of Servant.**

Master and Servant; Tort of Servant; Liability.—The legal liability of an employer for the wrongful acts of its employees depends upon whether such employee was acting in the line and scope of his authority at the time the wrong was committed.—*T. C. I. & R. R. Co. v. Rutledge*, 59.

Same; Evidence.—Where the action was for assault and battery committed by an employee of defendant, declarations of the employee made immediately preceding the alleged assault and going to show that the servant had orders to remove plaintiff from the premises, in connection with other facts and circumstances in evidence, were admissible as tending to disclose the authority committed to the employee.—*Ib.* 59.

Same; Fellow Servant; Doctrine Applied.—The common law doctrine of assumption of risk of injury by one servant consequent upon the negligence of a fellow servant is without application to the case of an assault by a mine foreman upon a mine employee, the foreman having particular au-

MASTER AND SERVANT—Continued.

thority to eject him from the mine; the effect of the doctrine is limited to risks incident to the common employment.—*Ib.* 59.

Master and Servant; Tort of Servant; Complaint.—Where the action was for false imprisonment against a railroad and one of its employees, a count alleging "that defendant's servant acting within his authority, wrongfully arrested and imprisoned plaintiff," is not sufficient, since the definite ascription of the servant's authority is left wholly at large between the two defendants.—*C. of Ga. Ry. Co. v. Carlock*, 659.

Master and Servant; Injury to Third Person; Negligence.—Both the master and the negligent servant may be joined in an action for injuries caused by the servant's negligence.—*Ib.* 659.

Same; Trespass by Servant; Parties.—In an action against a servant for an unauthorized, unaided and unratified trespass, the master cannot be joined as defendant in a single count.—*Ib.* 659.

Master and Servant; Injury to Third Person; Complaint.—Where the action was for personal injury caused by an automobile collision, a count alleging a willful and intentional injury inflicted by defendant's servant or agent, but which failed to charge that such servant or agent having charge or control of defendant's car at the time of the injury was acting within the scope of his employment by defendant, was subject to demurrer.—*Morrison v. Clark*, 670.

Master and Servant; Injury to Third Person; Variance.—Under a count alleging that defendant negligently caused or allowed his automobile to run against plaintiff's vehicle, plaintiff could recover on evidence which warranted the jury in drawing the inference that the wrongful act was committed by defendant, acting through servants or agents who were at the time acting in the line and scope of their employment.—*Ib.* 670.

Master and Servant; Injuries to Third Person; Instruction.—Where defendant's agent, within the scope of his employment, had the right to use the automobile at the time of the accident, charges to find for defendant, if at the time of the accident, defendant had no desire for the agent to take the automobile out and run it on the occasion when the injuries were inflicted; or if at the time of the accident, the agent was running it without regard to defendant's wishes or desires, were misleading in the use of the word "wishes" or "desires" and "desire," as it was not a question as to the wish or desire of the master, but of the authority of the servant or agent in charge just before and at the time of the collision to have and operate the car.—*Ib.* 670.

3. Discharge of Servant.

Master and Servant; Discharge; Salary; Mitigation.—Where an employee sued for compensation after wrongful discharge, pleas attempting to set up a defense that plaintiff could have received compensation in other employment which purported to be pleas in bar of the action, not stating expressly or by fair implication that they were pleas in abatement or mitigation of damages, were subject to demurrer, since a plea must answer all it professes to answer.—*Peoples Shoe Co. v. Skally*, 349.

Master and Servant; Compensation; Reduction.—When sued for wrongful discharge, an employer may reduce the amount of recovery by showing that the servant obtained other employment, or might have done so by the exercise of reasonable diligence, but he cannot use the fact to defeat entirely the servant's cause of action.—*Ib.* 349.

MINES AND MINERALS.

See **Master and Servant.**

Mines and Minerals; Rules; Notice.—Section 37, Acts 1911, p. 514, making a service of a copy of the rule upon a miner conclusive of his ac-

MINES AND MINERALS—Continued.

ceptance of the contents of the rule, whether he knew them or not, applies only to employees, and cannot be extended to invited licensees, since that class has no contractual relation with the operator of the mine.—*Robinson v. Maryland C. & C. Co.*, 604.

MORTGAGES.**1. Right of Surety on Foreclosure.**

Mortgages; Sale; Surety.—Where a widow joined as surety in a mortgage made by the heirs of her husband, covering two pieces of property, one belonging to the heirs, and the other to the widow, she had the right to have the property of the heirs first sold on foreclosure of the mortgage for relief pro tanto of her own.—*Todd v. Interstate M. & B. Co.*, 169.

2. Foreclosure and Incidents.

Chattel Mortgage; Foreclosure; Necessary Parties.—The original debtor or mortgagor is not a necessary party to a bill to foreclose an equitable chattel mortgage where he has parted with all title to the mortgaged property, and no deficiency judgment is sought against his assignee.—*Hamilton v. Clancey*, 194.

Same; Foreclosure; Execution.—Where the suit was to foreclose a mortgage and respondent by cross bill denied the execution of the notes and the mortgage by a sworn plea therein, respondent did not thereby undertake the burden to disprove the mortgage on which the foreclosure was sought, but the burden was upon complainant to prove the execution of the notes and mortgages, when offered in evidence (§ 3967, Code 1907.)—*Sulzby v. Palmer*, 645.

Mortgages; Foreclosure; Burden of Proof.—Where the suit was for the foreclosure of a mortgage, and the recorded mortgage, which referred to the note, and the note, were introduced in evidence, the introduction of the recorded mortgage prima facie discharged complainant's burden of proof as to its execution under § 3374, Code 1907, but did not discharge the burden as to the note; the execution of both note and mortgage being denied by sworn plea.—*Ib.* 645.

3. Sale of Property and Assumption of Debt.

Mortgages; Transfer of Property; Assumption of Mortgage Debt.—The general rule is that a purchaser of mortgaged lands is not liable for the mortgage debt unless he expressly or impliedly agrees to pay it.—*Interstate L. & I. Co. v. Logan*, 196.

Same; Part of Purchase Price.—Where the mortgage debt forms a part of the consideration of the purchase, the purchaser becomes the principal debtor to the extent of the property to indemnify his grantor, and a promise to discharge the obligation to that extent is implied, but the purchaser is under no personal liability for the mortgage debt.—*Ib.* 196.

Same; Land Primarily Liable.—Where the purchaser of a mortgagor assumes the payment of the mortgage but does not expressly assume any personal liability he is personally liable to the original mortgagor, but not to the mortgagee, and as to the mortgagor the purchaser becomes the principal and the original mortgagor a surety.—*Ib.* 196.

Same; Action Against Purchasers.—The mortgagee may recover in a suit against the purchaser who has assumed the debt, upon the ground of equitable subrogation.—*Ib.* 196.

Same; Subjecting Property; Inverse Order.—Where the successive purchasers of different portions of the mortgaged premises have notice, either actual or constructive, of prior sales, the rule of inverse order of alienation applies to their subjection to the mortgage.—*Ib.* 196.

Same; Conveyance of Mortgagor's Interest.—Where a grantee takes a parcel only, and his deed conveys only the mortgagor's right, title and in-

MORTGAGES—Continued.

terest in the land, such grantee assumes the whole of the incumbrance as a charge upon his parcel so purchased.—*Ib.* 196.

Same.—Where a grantee takes a parcel only, but receives a warranty deed therefor, he is, as to his grantor, freed from the lien of the mortgage, and his grantor assumes by the warranty the whole burden of the incumbrance as a charge on the unsold parcel.—*Ib.* 196.

Same; Liability of Mortgagor and Grantee as Principal and Surety.—Where the mortgagee releases a mortgagor or his grantee, liable as between the mortgagor and grantee, as principal, such release operates to release wholly or partially a mortgagor or his grantee liable as surety, in case the mortgagee had notice of the rights of such surety.—*Ib.* 196.

Same; Partial Release; Restraining Foreclosure.—Where the bill is by the grantee of a part of the mortgaged land to enjoin the foreclosure of the mortgage as to such land because the mortgagee has released from the mortgage a part of the land owned by another grantee, the bill is demurrable if it fails to aver the dates of the respective grants and of their recordation.—*Ib.* 196.

4. Payment.

Mortgages; Payment; Agreement to Accept Specific Property.—Where, for a valuable consideration, a mortgagee agrees to accept shares of stock in payment of the mortgage debt, a seasonable tender of such shares of stock is equivalent to a tender of the money due.—*McKenzie v. Stewart*, 241.

5. Priority.

Mortgages; Priority; Material-man's Lien.—A mortgagee in a prior recorded chattel mortgage has a claim superior to a lien for repairs upon automobiles given by § 4785, Code 1907, although the repairs were authorized by the owner then and at the time of the suit in lawful possession of the automobile, where it does not appear that the mortgagee had expressly or impliedly authorized the repairs.—*J. C. Walden Auto Co. v. Mixon*, 346.

6. Satisfying Record of.

Mortgages; Satisfying of Record; Excuse.—Mere inadvertence or indifference of a mortgagee after payment, and notice to satisfy would not excuse his failure to enter satisfaction on the record.—*Martin v. Walker*, 469.

Same.—Under the facts in this case it is held that as the mortgagees were warranted in assuming that the mortgagor actually desired that the mortgage be satisfied of record, the mortgagor by accepting the power of attorney authorizing the satisfaction and failing to object, acquiesced therein, and could not complain that the mortgagees failed to enter satisfaction themselves, and hence, were not entitled to recover the penalty for failure to enter satisfaction.—*Ib.* 469.

7. Recordation.

Mortgages; Recordation; Effect.—Where a mortgagor gave plaintiff a mortgage of date Feb. 8, 1909, which was not recorded until Feb. 16, 1909, and also gave defendant a mortgage of date Feb. 11, 1909, which was recorded Feb. 12, 1909, and defendant took his mortgage without notice of plaintiff's mortgage, defendant's mortgage was superior to plaintiff.—*Neeley v. Reynolds*, 581.

Same; Detinue; Priority.—Where the action was detinue, and both parties claimed as mortgagees of the same mortgagor, and the issue was whether or not defendant had actual notice of plaintiff's unrecorded mortgage when he took his own, the refusal of a charge embodying a correct statement of the law on the point strictly applicable to the issues and facts, was reversible error.—*Ib.* 581.

MORTGAGES—Continued.

Mortgages; Recordation; Actual Notice.—Notice is equivalent to registration, and a subsequent encumbrancer or purchaser with notice, cannot avoid the lien of the unrecorded mortgage, although the mortgage may be declared void by statute unless duly registered.—Ib. 581.

MOTOR VEHICLES.

Motor Vehicles; Ordinances; Right of Way.—A city ordinance providing that vehicles going in certain directions should have the right of way over vehicles going in other directions, does not mean that a vehicle not having the right of way at a crossing must at its peril avoid collision with a vehicle having a right of way, irrespective of care or negligence by either party.—*Ray v. Brannan*, 113.

Motor Vehicles; Collision; Jury Question.—In this case, under the evidence whether plaintiff exercised due care as to rate of speed at a street intersection, was a question for the jury.—Ib. 113.

Motor Vehicles; Use of Streets; Duty of Driver.—Although a driver may use any part of the highway, except under special circumstances, yet when meeting another vehicle or person, whether the vehicle be motor driven or horse drawn, the driver must turn seasonably to the right of the center of the traveled portion of the highway.—*Morrison v. Clark*, 670.

Same; Presumption.—Each driver of a vehicle on a highway has the right to assume that the other will obey the rule of the road in meeting and passing.—Ib. 670.

Same; Evidence.—Where a collision occurs in meeting with one driving on the left side of the highway, the fact that the other was driving on the wrong side of the highway is only prima facie evidence of negligence, which may be explained or justified as the particular circumstances or exigencies of the cause may warrant.—Ib. 670.

Same.—The fact that one was driving on the proper side of the road when the collision occurred, is evidence of due care.—Ib. 670.

Same; Proximate Cause.—The driver of a vehicle driving on the wrong side of a highway is not liable for injuries sustained by another in collision with his conveyance unless the negligent act of driving on the wrong side was the proximate cause of the injury, as there must be a causal connection between the unlawful and wrongful act of driving on the wrong side, and the resulting injury.—Ib. 670.

Same; Statute.—Under Acts 1911, p. 642, § 20, where the automobile driven by defendant's son was approaching from the rear of plaintiff, and was attempting to pass when the collision occurred, it was the duty of those in charge of the automobile to have the same under control, and not to pass until the right of way for free passage had been accorded them by plaintiff, as soon as practicable, or existed by the circumstances.—Ib. 670.

Same; Contributory Negligence.—If plaintiff negligently pulled his horse suddenly to the left without notice or warning to the driver of the automobile, while the automobile was so close that its driver did not have a reasonable opportunity to avoid the collision, there could be no recovery for the injuries caused by defendant's automobile.—Ib. 670.

Same; Instruction.—A charge asserting that the law of the road requires a person driving along a public street or highway to keep to the right, and if the jury found that plaintiff was not as near the right side of the street or highway, where the injury occurred, at the time of the injury, and that this was the proximate cause of the injury, then you cannot find for plaintiff under the negligent count, was properly refused.—Ib. 670.

Motor Vehicles; Use of Street; Jury Question.—Under the evidence in this case it was a question for the jury whether defendant's son who was driving the automobile had proper control or charge of the automobile when the injuries were inflicted.—Ib. 670.

MULTIFARIOUSNESS.

See Equity, § 1-a.

MULTIPLICITY OF SUITS.

See Equity, § 3-a.

MUNICIPAL CORPORATION.

See Motor Vehicles, as to use of Streets, etc.

1. Filing Claims Against.

Municipal Corporations; Defective Streets; Filing Claim; Time.—Under § 1275, Code 1907, when construed to effect its purpose to give the officers of a city opportunity to investigate the claim, and not to require technical accuracy which might result in the defeat of meritorious claims, a statement giving the day of the month and year, but not whether in the day time or night time, was a sufficient statement of the time.—*City of B'ham v. McKinnon*, 56.

2. Ordinances.

Municipal Corporation; Ordinances; Construction.—The ordinance considered and stated, and it is held not violated by one whose house had been previously constructed, until such person shall have been notified by the inspector, as provided in the ordinance.—*Tarrance v. Chapman, et al.*, 88.

Municipal Corporation; Ordinances; Conflict with General Law.—A municipal ordinance inconsistent with the general policy of the state as declared in its general legislation is void unless expressly authorized by the legislature, the provisions of § 89, Constitution 1901, having no application to limit the inhibition to cases where the legislature has made an act unlawful, and a municipality was trying by ordinance to make it lawful.—*Ward v. Markstein*, 209.

3. Streets and Control of.

Municipal Corporations; Streets; Regulation.—The owners of property abutting upon a city street have the right of access to it for the purpose of excavating and laying connections for water mains for similar purposes, the right being a property right, and not illegal as a private use of public property.—*B'ham W. W. Co. v. Hernandez*, 438.

Municipal Corporation; Private Use of Highway.—Public highways belong to the public from side to side and from end to end, and one using a public highway for his own private use commits an indictable offense, notwithstanding it may be so used with the permission of the municipal authority.—*B'ham E. & B. Ry. Co. v. Stagg*, 612.

NEGLIGENCE.

In particular actions, see that title.

1. Proximate Cause.

Negligence; Proximate Cause.—A person guilty of negligence is held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which did in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought reasonably possible to follow, if it had occurred to his mind at the time of his negligent act.—*W. U. Tel. Co. v. Favish*, 4.

Negligence; Proximate Cause.—Where there are two or more causes of an injury, the law will consider only the proximate cause, and not a remote cause.—*Garrett v. L. & N. R. R. Co.*, 52.

Same; Intervening Cause.—Where one cause merely created the condition, and after the condition had been created an intervening agency produced the injury, the first cause is not the proximate cause.—*Ib.* 52.

NEGLIGENCE—Continued.

Negligence; Pleading; Sufficiency.—While very general averments of negligence are sufficient in pleadings, yet such averments should show a causal connection between the negligence and the injury suffered; generally, it is sufficient to aver the facts out of which the duty springs, and the negligent failure to perform such duty, but it is not necessary to define the *quo modo*, or to specify the particular acts of diligence that should have been employed in the performance of such duty.—*B'ham E. & B. Ry. Co. v. Stagg*, 612.

2. Wanton.

Negligence; Wanton.—Wanton negligence rests upon the wrongdoers just apprehension of a probability of untoward consequences of his act.—*L. & N. R. R. Co. v. Porter*, 17.

Negligence; Wantonness; Instructions.—Contributory negligence is no defense to a count charging wantonness, and charges on that issue should be refused.—*So. Ry. Co. v. Fricks*, 61.

3. Violation of Duty or Substantive Law.

Negligence; Complaint; Sufficiency.—Where the action was for damages for burning plaintiff's residence, the fire being communicated thereto from defendant's house, and alleged to have originated from a defective chimney, a count alleging damages and destruction by fire of defendant's house and contents, and that defendant's negligence caused such fire to be communicated was not sufficient because it failed to show any duty owed by defendants to plaintiff and a breach thereof; mere proof of damage or destruction of the property by fire will not of itself authorize an inference of negligence, the rule as to locomotives having no application here.—*Tarrance v. Chapman*, 88.

Same; Violating Ordinances or Statutes.—The violation of a statute or of a valid city ordinance which proximately causes an injury, per se creates a cause of action, and establishes liability.—*Ib.* 88.

Same; Complaint; Municipal Ordinance.—A count in a complaint alleging violation of a city ordinance in regard to the construction of chimneys or flues, which did not allege whether defendant's house was constructed before or after the passage of the ordinance, will be construed as if showing that the house was constructed prior to the passage of the ordinance.—*Ib.* 88.

Negligence; Fire; Liability of Owner.—Where an owner of property sets out fire on his own premises for a lawful purpose, and in a proper and careful manner, and without negligence, or the fire accidentally starts without his fault, he is not liable for damages caused by its being communicated to the property or premises of another, unless he is thereafter guilty of negligence in failing to control or extinguish such fire before it spreads.—*Poe v. So. Ry. Co.*, 103.

4. Contributory.

Negligence; Contributory.—The right of one to expect the observance of specific legal duties by others does not excuse him from observing the specific duties imposed by law on himself, and if he fails to do so, and is proximately injured thereby, he cannot recover.—*Ray v. Brannan*, 113.

Same; Jury Question.—Where plaintiff had violated no specific legal duty so as to become guilty of negligence per se, the extent to which he may rely upon defendant's observance either of specific duty or general due care to avoid the injury is a question for the jury.—*Ib.* 113.

5. Licensee, etc.

Negligence; Licensee; Invitee.—A licensee upon the premises of another by invitation, injured at some point where he was neither invited nor

NEGLIGENCE—Continued.

expected to be was a bare licensee, and not entitled to protection as an invitee.—*Robinson v. Maryland C. & C. Co.*, 604.

Same; Warning.—Under the evidence in this case, it was a question for the jury whether the decedent was warned of the danger from a dropping or hanging wire at the particular point where he was killed; so also it was a question for the jury whether deceased wore a light when killed.—*Ib.* 604.

Same; Plea.—A plea that at the time he was killed decedent had been visiting about the mine in violation of the company's rules, and was returning to his place of work and came to his death while violating the rule of which he had notice, was not so framed as to authorize the general affirmative charge for defendant.—*Ib.* 604.

NEW TRIAL.

New Trial; Grounds; Jury Panel.—The presence on the jury of two persons stricken by defendant, and not selected as a part of the jury to try the cause, was good grounds for a new trial, where this was unknown to defendant and his counsel before judgment rendered.—*Greer v. Malone-Beall Co.*, 401.

Same; Waiver.—If after discovering the presence of such person on the jury panel, defendant had reasonable time and facility to interpose an objection before verdict, a failure to do so would be a waiver of the error, since he would have no right to speculate on a finding favorable to him, and afterwards complain of error.—*Ib.* 401.

Same; Negligence.—If defendant or his counsel had personal knowledge of the appearance and identity of the stricken jurors, their failure to note their presence on the panel during the trial would have been such negligence as to foreclose any complaint on that ground.—*Ib.* 401.

New Trial; Error in Panel; Negligence.—A brief delay by defendant in interposing objection to the presence on the panel after the trial of jurors which had been stricken by him, was not per se a waiver of his right in the premises.—*Ib.* 401.

New Trial; Ground; Surprise.—Where no motion for a continuance or postponement was made at the time of the giving of the evidence, a party is not entitled to new trial because taken by surprise by certain testimony.—*Southern Dredging Co. v. Christie*, 421.

NOTICE.

See Infants; in particular actions, see that title.

Notice; Pleading; Amendment.—Notice is necessary to perfect every amendment of which notice is required, and without it the cause will be reversed on appeal even though the chancellor and the counsel fail to note the omission at the hearing.—*Smith v. Lambert*, 269.

Same; Presumption.—Irregularity in the notice will not be presumed where the record in a chancery case recites that notice of an amendment was given.—*Ib.* 269.

NUISANCE.

See Railroads, § 6; Municipal Corporations.

Nuisances; Creation.—One who erects or creates a nuisance is liable for its continuation if he has actual notice or knowledge of its hurtful tendency, even after he has parted with title and possession of the property; his grantee or licensee becomes liable only when they continue the nuisance after knowledge of its hurtful tendency, or notice or request to move it.—*Lamb v. Roberts*, 679.

ORDINANCES.

See Intoxicating Liquors; Municipal Corporations, § 2; Inspection.

PARTIES.

See Appeal and Error, § 3.

Parties; Plaintiff; Joinder.—Where the action is joint for injuries from overflow, plaintiffs cannot recover damages purely personal to each, such as physical or mental pain, anguish or inconvenience of either plaintiff alone, although both suffered like damages.—*Brookside P. M. Co. v. McAllister*, 110.

Parties; Joinder; Tort Feasors.—Joint tort feasors may be sued jointly or severally.—*City of B'ham v. Hawkins*, 127.

PARTNERSHIP.

Partnership; Actions; Parties.—Where partners, as trustees, liquidated the partnership indebtedness, and filed a bill against their co-partners for contribution and accounting, all the members of the partnership are proper parties, and presumptively necessary parties.—*Webb v. Butler, et al.*, 181.

Same.—Those partners not interested in an accounting, and not liable for partnership debts are not necessary parties to a bill for contribution and an accounting.—*Ib.* 181.

Same; Joinder.—Where the bill was filed by partners, who had liquidated the partnership debt, against their co-partners for contribution and accounting, it was not demurrable because it joined a former partner, as he was a proper, if not necessary, party, and it was not necessary that the bill should negative his defense of non liability.—*Ib.* 181.

Same; Contribution and Accounting; Plea.—The bill examined and held to sufficiently allege facts showing that certain partners who were not made parties were not interested in the settlement.—*Ib.* 181.

Partnership; Settlement; Bill.—A bill for an accounting between partners which alleges that complainant purchased an undivided one-tenth interest in the coal mining business of respondent, and paid the stipulated purchase price, sufficiently alleged the partnership with all its legal incidents, and was not rendered demurrable because it did not contain a contractual specification of these incidents.—*Reilly v. Woolbert*, 191.

Same.—Where a partner is excluded from participation in the firm business he is entitled in equity to an accounting and settlement whether the nature of the account be simple or complicated.—*Ib.* 191.

PAYMENT.

See Mortgages, § 3.

Payment; Application; Right to Direct.—A debtor has the right to direct the application of a payment, and the creditor may make application as he desires if the debtor fails to direct; the law, in the absence of a specific application by either the debtor or the creditor would apply the credit most beneficially to the creditor, that is, to the most precarious debt, or the one least secured, and payment cannot be applied to a debt not matured where there is an unsatisfied matured one, except by consent of the parties.—*Porter, et al. v. Watkins*, 333.

PARTITION.

Partition; Bill; Requisite.—A bill for the sale of realty and a distribution of the proceeds, which alleges that respondent owned an undivided three-fourths interest, and that the three complainants owned a one-fourth interest, but not averring the respective interests of complainants, was defective as the court could not know how to distribute the proceeds, as no intendment could be indulged that they owned the one-quarter interest equally.—*Martin v. Cannon, et al.*, 151.

Partition; Agreements; Estoppel.—Where a co-tenant demanded partition, and went into immediate and exclusive possession of the portion of the land set apart to him by parol agreement, he and his successors in title

PARTITION—Continued.

were estopped to repudiate such agreement, or to question its validity, and their interest in the balance of the tract ceased to exist in equity.—*Betts, et al. v. Ward*, 248.

Same; Requisites.—Actual separation of parts is not necessary to a partition, but any act of the co-tenants allotting to each the portion of the property which he can take and enjoy without interruption, is sufficient.—*Ib.* 248.

Same.—In a partition it is not necessary that each co-tenant take his own share in severalty, but the co-tenants may divide the land in such manner as they deem most conducive to their mutual interests, and two or more may take shares as tenants in common.—*Ib.* 248.

Same; Ratification.—An attempted partition originally ineffectual or voidable becomes binding by the ratification or acquiescence of all persons interested in the property.—*Ib.* 248.

Same; Who May Attack Validity.—A stranger cannot attack the validity of a partition between co-tenants.—*Ib.* 248.

Same.—A mortgagee of the undivided interest of a co-tenant cannot attack a voluntary partition fairly made between the co-tenants, unless it be tainted with fraud affecting his interest.—*Ib.* 248.

Same; Mode of Division.—While a partition under a voluntary agreement is not binding upon co-tenants who did not enter therein, nor upon purchasers who had no notice, yet the court will, in subsequent partition proceedings, set off the shares in accordance with the attempted partition insofar as it can do without serious injury.—*Ib.* 248.

Same; Statutory Provision.—Sections 5203, 5214, 5215, 5221, and 5231, Code 1907, do not authorize partition, at the suit of one holding under foreclosure of a mortgage on a portion of the tract allotted to a co-tenant by a parol partition, of the balance of the tract.—*Ib.* 248.

Partition; Cross Bill.—Where the bill avers a joint ownership of the lands, and invokes the aid of a court of equity for sale for partition, a cross bill seeking the affirmance of a prior parol partition, and the correction of the conveyances under which complainants claim, as a cloud on respondent's title, and a cancellation of other conveyances to complainant as a cloud on the title acquired by the parol partition is not subject to demurrer.—*Ib.* 248.

Same.—In such an action a cross bill seeking affirmance of a former parol partition, correction of conveyances under which complainant claims as a cloud on respondent's title, and a cancellation of other conveyances to complainant as a cloud on title acquired by the parol partition, sets up an independent equity which would sustain the jurisdiction of the court notwithstanding the original bill had been dismissed by complainant.—*Ib.* 248.

Partition; Title; Adverse Claim.—Under § 5220, Code 1907, the probate court is without jurisdiction to proceed with the partition for sale for distribution among tenants in common, where an adverse claim is asserted, unless upon investigation it determines that the claim is not grounded in good faith.—*Langley v. Langley*, 566.

PEDIGREE.

See Evidence, § 11.

PLEADINGS.

In particular actions and crimes, see that title.

1. Inconsistent Allegations.

Pleading; Inconsistent Allegation.—A complaint is not rendered demurrable because it contains two counts, one charging simple negligence and the other wanton.—*A. G. S. R. R. Co. v. Smith*, 77.

PLEADING—Continued.

2. Demurrers.

Pleading; Demurrer; Specifying Ground.—Where the complaint alleged that defendant was operating a railroad, and that plaintiff while in the service of defendant as a bridge repairer, and engaged in his duties, received injuries from the negligence of defendant's employee, acting as superintendent, in permitting defendant's motor car of which he was in charge, to be wrecked, was sufficient as against the demurrer which did not specifically raise the point that it was essential to aver that plaintiff was an employee in and about the railroad, or that his duties required him to be working in and about the railroad. (Subdiv. 5, § 8910, Code 1907.)—*B'ham So. Ry. Co. v. Stephens*, 107.

3. Construction.

Pleading; Construction; Demurrer.—When attacked by demurrer a pleading is construed most strongly against the pleader.—*Martin v. Cannon*, et al., 151.

Pleading; Construction; Demurrer.—When attacked by demurrer facts stated in a petition must be treated as true.—*Walker v. Mutual A. T. Co.*, 154.

Pleading; Construction on Appeal.—In determining whether a count of a complaint to which demurrers were improperly overruled, is sufficient to support a judgment, the appellate court will give it a liberal construction, and resolve all reasonable inferences in favor of the count, as stating a cause of action, and will infer that the pleader charged such a controversy as would afford a valuable consideration for the compromise declared upon, and which the evidence failed to establish.—*Daniel v. Hughes*, 368.

Pleading; Construction; Inference.—Where pleas were interposed by defendant after its demurrers to the amended complaint were overruled, they went to the amended complaint, although they did not specifically so state.—*W. U. Tel. Co. v. Miller*, 620.

4. Facts or Conclusions.

Pleading; Ownership.—A general allegation of ownership is an averment of an ultimate fact, and not a conclusion of law.—*Sheffield Nat. Bank v. Corinth B. & T. Co.*, 275.

Pleading; Conclusion.—Where the action was for commissions for the sale of defendant's property to the government, a plea setting up that plaintiff in making the sale resorted to lobbying to bring personal influence to bear on the officers so as to render the contract voidable at the election of the government, states conclusions and not the facts relied on as is required by § 5330, Code 1907.—*Russell v. Bush*, 309.

5. Sufficiency.

Same; Sufficiency.—A plea addressed to the whole complaint is subject to demurrer if not a complete answer to every count.—*Russell v. Bush*, 309.

Pleading; Sufficiency; Answering Part.—A plea professing to answer the whole declaration, but which in fact answers only one count thereof, is bad on demurrer.—*Peoples Shoe Co. v. Skally*, 349.

Same.—A plea which assumes to answer the whole declaration, but which omits to answer a material part thereof, is bad on demurrer.—*Ib.* 349.

6. Amendment.

Pleading; Amendment; Discretion.—It is discretionary with the court to allow a defendant to file pleas which are in substance amendatory statements of his defense.—*Lowy v. Rosengrant*, 337.

PLEADING—Continued.

Pleading; Amendment.—Unless injustice will thereby result to the other party, the right of amendment during the progress of the trial is authorized by § 5367, Code 1907.—*Georgia C. Co. v. Lee*, 599.

7. Filing.

Pleading; Filing; Time; Discretion.—The matter of allowing special pleas to be filed more than two months after the action was commenced, and after the time fixed by the statute was within the discretion of the trial court.—*Colley v. Atlanta B. & I. Co.*, 374.

8. Verification.

Pleading; Verification; Necessity.—The provisions of § 5332, Code 1907, are without application to a suit in detinue, where the trial is had only on a plea of the general issue.—*Knight v. Garden*, 517.

Pleading; Instrument; Burden of Proof.—Where § 3967, Code 1907, is complied with by filing a plea of non est factum in a suit on a written instrument, the burden of proving the instrument is cast upon the complainant.—*Sulzby v. Palmer*, 645.

Same; Non Est Factum.—The want of an affidavit to the plea of non est factum is a defect available on demurrer.—*Ib.* 645.

Same.—Where the action is on a note, a plea averring that the date of the note has been changed since it was signed is a plea of non est factum.—*Ib.* 645.

Pleading; Demurrer; Verification.—A plea in abatement when required to be verified under § 5332, Code 1907, is demurrable if not verified, although it was subject to motion to strike on the same ground.—*A. G. S. R. Co. v. Loveman C. Co.*, 683.

PLEDGES.

Pledge.—Since the law affords remedies to redeem property pledged as security for the performance of a contract, a bill in equity will not lie.—*Minge v. Clark*, 617.

Mortgages; Pledges; Distinction.—In a mortgage the legal title is vested in the mortgagee, leaving the mortgagor with only an equitable title which only a court of equity can enforce, but in the matter of a pledge, the pledgor retains the legal title to the property, and a court of law can act upon and enforce it.—*Ib.* 617.

Pledges; Payment; Effect.—The payment or tender of payment by the pledgor of the debt secured extinguishes the lien of the pledgee, leaving in the pledgee the naked possession exposed to the pledgor's action at law to recover it.—*Ib.* 617.

Same; Redemption; Remedy.—The mere failure of the plaintiff pledgor to perform a condition precedent necessary to equip him to maintain an action at law does not authorize a court of equity to interfere and relieve him of the consequences, as where a pledgor, suing in detinue for the recovery of the pledge, omitted to pay or tender to the pledgee the amount due.—*Ib.* 617.

Same; Equity.—The offer of the pledgor to pay the pledgee any amount which might be due on the contract did not give a bill to redeem property pledged as the security for the performance of a contract equity.—*Ib.* 617.

Same.—Where complainant had several adequate remedies at law upon paying or tendering the pledgee the amount due on the contract a bill to redeem the pledged property was not good as one for a specific performance.—*Ib.* 617.

CHARGE OF COURT—Continued.**8. Singling Out Evidence.**

Same; Singling Out Evidence.—Charges which give to particular parts of the evidence are refused without error. *Jones & Weeden*, 417.

Same; Undue Emphasis.—It is proper to refuse to give undue emphasis or prominence to particular portions of the evidence. *Johnson v. The State*, 590.

9. Argumentative.

Charge of Court; Argumentative.—Argumentative charges are properly refused. *Kellar v. Jones & Weeden*, 417.

Charge of Court; Argumentative.—It is proper to refuse to give undue weight to charges which are argumentative. *Madison v. The State*, 590.

10. Effect of Evidence.

Charge of Court; Effect of Evidence.—Where the charge is based on a sit for commissions on automobiles sold by plaintiff, and on a custom or usage of trade, but there was no proof that plaintiff had knowledge thereof, its oral charge that the contract itself, was not improper. *Cole v. Moto*, 382.

11. Reasonable Doubt.

Charge of Court; Reasonable Doubt.—A charge that the jury should give the benefit of the doubt to defendant, and would impose upon the rest of the jury the reasonable doubt only one juror, and its refusal was proper. *Martin v. The State*, 584.

Same; Presumption of Innocence.—A charge asserting that the presumption of innocence continued with defendant until proved guilty, and that the jury should acquit, was faulty, as tending to mislead the jury that he could not be convicted unless the jury was convinced of his guilt. *Ib.*, 584.

Charge of Court; Reasonable Doubt.—Supposition of fact or habit in judicial procedure, and hence, a charge that the jury cannot find defendant guilty unless they believe all reasonable supposition, was properly refused. *Dawson v. The State*, 584.

Charge of Court; Mind of Juror.—The fact that the juror was in a state of doubt or uncertainty, might warrant a verdict for defendant. *Morrison v. The State*, 584.

12. Stating No Legal Proposition.

Same; Involving no Proposition of Law.—A charge that the jury must construe every reasonable doubt in favor of the defendant, properly refused as stating no proposition of law, since it cannot be construed. *Martin v. The State*, 584.

13. Willfully or Corruptly Swearing.

Charge of Court; Corrupt Swearing.—Where there is an attempt to show that a witness gave willful or corruptly false testimony, it was error to refuse a charge that if the witness had made contradictory statements concerning the material fact, they might disregard his entire testimony. *v. The State*, 586.

Same; Credibility of Witness.—Where there was no attempt to show that a witness gave willful or corruptly false testimony, but that the witness had made contradictory statements concerning the material fact, it was error to refuse a charge that if the witness had made contradictory statements concerning the material fact, they might disregard his entire testimony. *v. The State*, 586.

RAILROADS.**1. Injury to Stock.**

Railroads; Injury to Stock; Burden of Proof.—Where the action was against a railroad for injury to a horse, and the only negligence charged was "in running an engine into a horse" and there was no count relying on negligence as for frightening the animal and thereby causing the injury, the provisions of § 5476, Code 1907, were applicable, and the burden was not on plaintiff to show negligence on the part of the agent of the road, as would have been the case had the injury been caused by merely frightening the animal.—*L. & N. R. R. Co. v. Davis*, 14.

Same; Instructions.—In such an action an instruction putting the burden on plaintiff to reasonably satisfy the jury that defendant was operating the road, that it damaged the horse, and that, after plaintiff established his ownership and that the horse was damaged by the train, the burden was on defendant to show, and all the evidence would have to establish that defendant was not guilty of negligence in killing the horse, although possessing misleading tendencies when standing alone, was cured by instructions that the jury must believe, before plaintiff was entitled to recover, that defendant was responsible for the injury; that is, that its train ran into and injured the horse on account of the negligence of defendant, etc.—*Ib.* 14.

2. Persons on Track.

Railroads; Persons on Track; Protection.—A trespasser on a railroad track coming up the track to a crossing is not entitled to the protection or care required of a railroad as to persons using the crossing.—*L. & N. R. R. Co. v. Porter*, 17.

Railroads; Persons on Track; Wantonness.—Evidence that a trespasser was run down in the day time by a slowly moving train near a station where people were frequently on the track during the day does not justify the submission of wanton negligence.—*Ib.* 17.

Same; Trespassers.—Where a person for his own purposes catches a freight train for a ride thereon, and on alighting therefrom walks on down the track to the station, he is a trespasser.—*Ib.* 17.

Same; Burden of Proof.—The burden of proof of negligence or wantonness which results in killing a person is on plaintiff throughout the case, if the person killed be a trespasser.—*Ib.* 17.

Railroads; Persons on Track; Complaint.—Where the complaint alleged that the place where deceased was run down and killed was one where people traveling along the track were wont to pass in great numbers, which fact was known by the agents and servants of defendant, who knew that plaintiff's intestate was going to be in said place, and that the servants of defendant willfully, wantonly and intentionally backed the car on a side track at a high and dangerous speed, without giving any warning, running the same over and killing plaintiff's intestate, charged wantonness, and was not misleading in such sense as to induce defendant to believe that simple negligence was charged.—*So. Ry. Co. v. Fricks*, 61.

(3) Crossing Accident.

Railroads; Crossing Accident; Burden of Proof.—Where the complaint charges wantonness in bringing about the death at a railroad crossing the provisions of § 5476, Code 1907, are without application, and, in such case, the burden is on plaintiff throughout the trial to sustain the allegation of wantonness.—*A. G. S. R. R. Co. v. Smith*, 77.

Same; Contributory Negligence.—Where a deceased, on hearing the approaching train, stopped as if to wait for the train to pass, and then, after looking in the direction from which the train was coming, started to cross the track when the train was about 100 feet away, and the danger was immi-

RAILROADS—Continued.

ment, such deceased was guilty of contributory negligence which deprived his representative of the right to recover on account of any alleged prior negligence of defendant.—*Ib.* 77.

Same; Assumption that Danger Would be Avoided.—Where deceased stopped before going on the crossing as if to await the passing of the approaching train the engineer had the right to assume that deceased would stay in a place of safety.—*Ib.* 77.

Same.—Where deceased stopped on approaching a railroad crossing as if to wait for a train to pass, and then went upon the crossing and was killed, the burden of proof is on plaintiff to show negligence on the part of the engineer after deceased left his place of safety to go upon the track.—*Ib.* 77.

Same.—The provision of § 5476, Code 1907, are without application where the person hit at the crossing was guilty of contributory negligence, as he was in no better case than a trespasser whose peril and presence had been discovered.—*Ib.* 77.

Same; Last Clear Chance.—Where deceased, after stopping to wait for a train to pass, left his place of safety to cross the track when the engine was from seventy-five to one hundred feet away, and the engineer did everything in his power to stop the train, the doctrine of last clear chance has no application, and plaintiff could not recover for negligence subsequent to the discovery by the engineer of the fact that deceased would try to cross in front of the approaching train.—*Ib.* 77.

Same; Wantonness.—In such a case plaintiff could not recover on the ground of wantonness subsequent to the discovery by the engineer of the fact that deceased would try to cross in front of the approaching train.—*Ib.* 77.

Railroads; Crossing Accidents; Evidence.—The evidence in this case examined and held not sufficient to sustain a verdict for the plaintiff.—*Ib.* 77.

Railroads; Crossing Accident; Wantonness.—Wantonness does not, as a matter of law, grow out of passing at great speed over a populous crossing at grade, but depends upon its reasonableness as measured by conditions to be reasonably anticipated.—*Ib.* 77.

Same; Instruction.—In such an action an instruction that to constitute wantonness, the actual presence of the person injured or killed need not actually be known to those operating a train, although correct in itself, was misleading when coupled with the statement that wantonness consists in passing at great speed over popular crossings at grade.—*Ib.* 77.

Railroads; Crossing Accident; Instruction.—Where there was evidence of conditions which would require the observance of a statute relating to keeping a lookout and giving signals at a crossing, there was no error in charging the jury relevant thereto, or in refusing instruction taking such evidence from the jury's consideration.—*L. & N. R. R. Co. v. Lovell*, 94.

Railroads; Crossing Accident; Wantonness.—The fact that a train approached the town crossing, over which several hundred people and vehicles passed daily, at a rate of speed not exceeding 3 or 4 miles per hour, and without any signals or actual knowledge of the approach of plaintiff's automobile, did not render the engineer guilty of wantonly or intentionally striking said automobile.—*Bailey v. So. Ry. Co.*, 133.

Same; Contributory Negligence.—Although defendant may have been guilty of simple negligence in failing to ring a bell, or blow a whistle as its train approached a town crossing, and in leaving box cars on its sidetrack so as to unreasonably obstruct the view of travelers as to approaching trains, yet the failure of plaintiff's chauffeur to stop his car and look and listen before attempting to cross the main track, and in crossing it at a speed of not less than 2 miles an hour, was, as a matter of law, contributory negligence, barring a recovery for damages to the car.—*Ib.* 133.

RAILROADS—Continued.

4. Setting Out Fire.

Railroads; Setting Out Fire; Prima Facie Case.—The mere fact that fire was communicated to plaintiff's property from a burning railroad car or a building on the railroad right of way does not make out a prima facie case of negligence as in cases of fire set out by sparks from passing locomotives.—*Poe v. So. Ry. Co.*, 103.

Same; Burden of Proof.—Where there was evidence tending to show that plaintiff's building was ignited by fire from a locomotive the burden passes to the railroad company to show at least prima facie that the fire was emitted without negligence in the engine's construction, equipment and operation.—*Ib.* 103.

Same.—Where fire is communicated from a railroad's right of way, in consequence of a burning building on the right of way, or a burning car merely standing on the track, the same rules of evidence prevails as to the burden of proof, as in other cases of fire communicated from one building to another, or one premises to another, in the absence of a statute.—*Ib.* 103.

Railroads; Setting Out Fire; Burden of Proof.—Where the action was against a railroad for negligently setting out fire, and the negligence is alleged generally, proof that the fire was caused by sparks from the railroad locomotive, makes out a prima facie case for the plaintiff.—*A. G. S. R. R. Co. v. Loveman C. Co.*, 683.

Same.—In such an action, such a prima facie case casts the burden on defendant of proving not only the proper equipment and construction of the locomotive, but that it was properly and skillfully operated.—*Ib.* 683.

Same; Jury Question.—In this case, it was for the jury under the evidence to determine the origin of the fire, as well as the sufficiency of the equipment, construction and operation of the locomotive.—*Ib.* 683.

Same; Instructions.—A charge asserting that the mere fact, if it be a fact, that the property of plaintiff was discovered to be on fire soon after the passing of one of defendant's locomotives, raised no presumption that said fire had originated by sparks escaping from the said engine, is not only argumentative, but ignored other facts tending to show that the engine set out the fire.—*Ib.* 683.

Same.—A charge asserting that if the jury believe from the evidence that defendant used a spark arrester of an approved pattern in general use, which upon inspection by competent persons at or about the time of the fire mentioned, appeared to be in good condition, and that said engine was run and handled by a competent and skillful engineer, in the ordinary manner of handling such engine, at the time and place when and where such injury occurred, and if you further believe that said fire originated by the sparks escaping through such spark arrester your verdict should be for defendant, etc., was properly refused as omitting mention of the requirement of a properly constructed engine.—*Ib.* 683.

5. Frightening Animals.

Railroads; Frightening Animals.—Where the negligent act of a railroad's servant in operating its train was a continuing contributing cause to frightening plaintiff's mule, resulting in injury to plaintiff, he has a cause of action against the railroad.—*L. & N. R. R. Co. v. Jenkins*, 136.

Railroads; Frightening Animals.—The general rule is that for an injury resulting from the frightening of a horse in the proper operation of a train, or other instrumentalities of a railway, no damages are recoverable, but where an engine is managed in such a reckless and negligent manner as to frighten a horse and cause it to run away, the company is liable for the consequences; such as where the engineer suddenly discharges a jet of steam near a passing team, or allows the steam to escape at a crossing or

RAILROADS—Continued.

near a highway, making a great noise, when teams are approaching, especially when it is unnecessary.—*Ib.* 136.

Same; Jury Question.—Questions whether the road's agent in charge of the engine which is alleged to have frightened plaintiff's mule, saw plaintiff and the frightened mule which he was trying to drive or control, was for the jury under the evidence.—*Ib.* 136.

Same.—Whether defendant's agent operating the engine, if he became aware of plaintiff's presence driving the frightened mule, under the circumstances of the place, and of the situation, exercised due care not to frighten, or not to increase the fright of the mule, was a question for the jury under the evidence.—*Ib.* 136.

Railroads; Frightening Animals; Instructions.—Although a railroad has the right to operate its trains along its tracks parallel with a highway in the usual manner, and with the usual and customary noises, without liability to a driver of an animal frightened thereby, yet if the peril of the driver was apparent to the agent of the road in charge of the engine, such agent owed the driver the duty to shut off unnecessary escaping steam at the cylinder cocks, to allay the fright of the animal, when it could have been instantaneously done without interfering with the operation of the train.—*Ib.* 136.

6. Operation by Receiver.

Railroads; Receivers; Nuisance; Knowledge.—Where the receiver of a railroad had not created a nuisance, an action could not be maintained against him for maintaining the nuisance, unless he had notice or knowledge of the hurtful tendency of the nuisance, or had been requested to abate it, the same being a mere nonfeasance.—*Lamb v. Roberts*, 679.

RECEIVERS.

See Railroads, § 6; Nuisance.

RECORDS.

Records; Validity; Collateral Attack.—Where the validity of the record of a mortgage is put directly in issue by the pleading of the attacking party, the attack is direct; the attack is collateral only where there are no proper averments against the record.—*Knight v. Garden*, 516.

REGISTRATION.

See Elections.

RELEASE.

Release; Rescission; Tender; Time.—Where plaintiff was injured and made a release of his injuries, and in a suit for the damages instituted thereafter, set up mental incapacity, and that as soon as he reasonably could after discovery of the alleged settlement and release he made a tender to defendant of the sum paid, he sufficiently alleged tender at the earliest practicable moment.—*Beatty v. Palmer*, 67.

Same; Pleading.—Where the action was for damages for personal injuries, and the defense was a release and settlement, a replication thereto alleging that at the time of the making of the release on account of plaintiff's weak mental and physical condition, and the use of medicine in the treatment of his injuries, he did not have the mental capacity to make such settlement, and was incapable of knowing and appreciating the extent of his injuries, sufficiently alleged that he did not know and appreciate the contents of the release so as to show fraud in securing it.—*Ib.* 67.

Release; Rescission; Tender.—An offer to return money paid under an alleged fraudulent release if within a reasonable time after discovery of the fraud, although rejected, is as effectual to rescind the release as if accepted,

RELEASE—Continued.

if the plaintiff so considered it, and if, in his subsequent action the compromise was sustained, he would hold the same by a valid transaction, and, if declared invalid, the sum so held should be set off against the amount allowed.—*Ib.* 67.

Same; Evidence.—In such an action, it was immaterial what plaintiff did with the money received in consideration of the release after he had tendered the money to defendant, and it had been rejected.—*Ib.* 67.

Same.—Where the action was for personal injury and suit was instituted after plaintiff had attempted to rescind the release by a tender of the money paid under it, and plaintiff alleged that the release was fraudulently obtained, plaintiff was entitled to great latitude in examining the agent who obtained the release on the issue as to whether he represented defendant or an indemnity company, the witness having stated that he represented defendant.—*Ib.* 67.

Same; Jury Question.—Under the evidence in this case it was a question for the jury whether the release was fraudulently obtained, and whether at the time plaintiff was incapable of making the contract.—*Ib.* 67.

Same; Evidence.—Where the action was for personal injuries, and the defense was a release, the replication setting up a rescission of the settlement by a tender of the money paid thereunder, and fraud, the admissibility of the character of the agency and of the identity of his principals must be tested, not by its intrinsic force, but by its tendency in connection with the other evidence to show an interest in such agent in securing the alleged fraudulent settlement.—*Ib.* 67.

Same; Time; Burden of Proof.—Where the action is by plaintiff after an attempted release in damages with replication as to an attempted rescission of the release for fraud, and by tender of the money paid, the burden is on plaintiff to show the reasonable promptitude of his offer to rescind if it is denied by defendant.—*Ib.* 67.

Same.—Where it is shown that defendant and her husband were absent from their residence for sometime after a release of plaintiff's claim, letters from plaintiff's attorney seeking to rescind such settlement and release were admissible on the issue of prompt action to rescind.—*Ib.* 67.

Release; Rescission.—Testimony of the agent of plaintiff as to his authority to make a tender of the money paid in an attempt to rescind the release, was properly admitted.—*Ib.* 67.

Same; Time of Acceptance.—Where a defendant frequently rejected a tender of money made in an attempt to rescind an alleged fraudulent release, defendant could not alter her status by offering on the trial to accept the money and demanding its return.—*Ib.* 67.

RESCISSION.

See Contracts; Release.

SALES.

Sales; Contract; Countermanding.—Where the order signed by the defendant reserved the right to the seller to accept or reject the sale made by its representative, the sale was conditional, and the buyer could countermand it at any time before its acceptance.—*Holmes v. Bloch*, 322.

Sales; Countermand; Evidence.—Under the evidence in this case it was a question for the jury whether the buyer had countermanded the order before acceptance, there being evidence that the countermand was posted only a short time after the order was given, and that the two would leave on the same mail.—*Ib.* 322.

Sales; Failure to Deliver.—Failure of a seller of goods to deliver on time gives the buyer an option to treat the contract as terminated, or to waive the time limit, and insist on delivery within a reasonable time; if he

SALES—Continued.

does the latter he cannot put the seller in default until he has given notice of his desire to receive the goods with the offer of reasonable time for making the delivery after notice.—*Lowy, et al. v. Rosengrant*, 337.

Same; Rescission.—Where time is the essence of the contract for the delivery of the goods, and the seller fails to deliver, the buyer is under no duty to give notice of his rescission for non delivery.—*Ib.* 337.

Same.—Where the buyer of goods gives notice of his rescission of the contract because of non delivery, he must rescind the contract unequivocally, and without reservation.—*Ib.* 337.

Same; Limit of Time.—Where delivery has not been made within the time stipulated in the contract and the buyer does not treat the contract as broken, but evidences to the seller a purpose to continue it in force, or to reserve to himself the right to insist on its further performance at some future time, the buyer waives the time limit for delivery, and for a reasonable time thereafter, both buyer and seller are bound by the contract.—*Ib.* 337.

Sales; Remedy of Buyer; Evidence.—The evidence in this case examined and held insufficient to show the bale of cotton was water packed or plated, but rather to show that it was sold as damaged cotton without fraud, and hence, nor authorizing a recovery under § 3734, Code 1907.—*Wallace v. Crosthwaite*, 356.

Sale; Breach of Warranty; Evidence.—Where the action was for the purchase price of gasoline, and the defense was for breach of warranty as to quality, evidence that the gasoline was not of the quality warranted, and that the vendor was notified of that fact and given an opportunity to make his warranty good is admissible.—*Meador & Son v. Standard Oil Co.*, 365.

Sale; Contract; Jury Question.—Under the evidence in this case it was a question for the jury whether the purchaser complied with the requirements of the contract in making tests of the dry kiln apparatus, which was purchased under warranty.—*Walsh Mfg. Co. v. W. T. Smith L. Co.*, 371.

Same; Instruction.—The charges examined and held to properly state the duty of the buyer to make required tests, and to return the property, if found unsatisfactory; also as to waiver by the seller of requirements that the property be returned within a specified time if found unsatisfactory.—*Ib.* 371.

Sales; Vesting Title.—Where the seller of three automobiles shipped them with bill of lading attached to draft, which was understood by the purchaser to be a shipment C. O. D., but omitted the price of one of the cars from the draft, the seller did not part with the title to such car.—*Finney v. Studebaker Cor.*, 422.

Sales; Evidence; Agency for Buyer.—Where the action was to recover for underweight in cotton, and for billing at lower than true grade, the testimony of the party who acted for plaintiff in the sale, relative to the conversation leading up to the sale and its consummation by delivery, tending to show that the cotton was purchased by defendant and not by the party acting for defendant, was admissible.—*Georgia Cotton Co. v. Lee*, 599.

Sales; Seller; Evidence.—Evidence as to whether the party who bought for defendant had an account in the bank of the party who sold for plaintiff, for the purchase of cotton, was immaterial and properly excluded.—*Ib.* 599.

Same.—It is proper to permit testimony that certain of the cotton was delivered for the seller from the warehouse of the witness; that defendant's weigher called back or under weighed the cotton two or three pounds to the bale; and that witness thereafter re-weighed two of the bales and found that one had gained four pounds and the other six pounds.—*Ib.* 599.

Sales; Warranty; Evidence.—Where an express warranty of the quality of the logs was established in an action for a breach of warranty in the

SALE—Continued.

sale of the logs, an implied warranty could not be invoked.—*Holt L. Co. v. Givens*, 640.

Sale; Jury Question.—Under the evidence in this case the issue of fact as to the number of bales plaintiff had of the respective grades, was a question for the jury.—*Georgia C. Co. v. Lee*, 599.

Same; Instruction.—Under the evidence in this case, it was not error to give at plaintiff's request a charge asserting that if plaintiff sold the cotton to defendant, and the grades were agreed upon, and defendant did not pay plaintiff the price agreed upon, based upon the grades agreed upon, the jury must find for plaintiff for the difference between the price, based upon the grade agreed upon, and the grade shown to have been the grades upon which payment was made.—*Ib.* 599.

SET-OFF AND COUNTER CLAIM.

See Damages, § 5.

SHERIFFS AND CONSTABLES.

Sheriffs and Constables; Indemnitors; Evidence.—Where plaintiff claimed in trespass and trover, and also alleged the destruction of his landlord's lien, the action being against the obligors on an indemnity bond to the sheriff to procure the levy of an execution, the indemnity bond was admissible.—*Thrasher v. Neeley*, 576.

Sheriffs and Constables; Indemnitors; Jury Question.—Where plaintiff claimed that his landlord's lien was destroyed by a sale of the property under execution, the action being against the indemnitors of the sheriff, proof that the property was sold under attachment without notice of the lien, and that its whereabouts were unknown to plaintiff, entitled plaintiff to go to the jury.—*Ib.* 576.

SHIPPING.

Shipping; Charter Party; Rescission.—The right of the lessor to rescind a charter contract for the reason that semi-monthly payments were not made promptly in advance as provided by the contract, was lost by an unreasonable delay as to an installment due Sept. 19, and notice of rescission was not given until Dec. 1st, following.—*Bell v. McKay & Co.*, 408.

Same; Grounds; All Demands.—Although a lessor had previously accepted tardy payments, an agreement that a contract in installment due Nov. 19, should be paid Nov. 30, was a sufficient demand for payment to support a rescission for non payment on Dec. 1st.—*Ib.* 408.

Same; Waiver.—Where the lessor rescinded a charter contract for a payment previously due, it was not inconsistent to subsequently accept such overdue payment.—*Ib.* 408.

Same.—Where a contract of installment was paid to the lessor's recently discharged agent who forwarded it to the lessor, stating that it was paid and accepted for a new period of extended service, the lessor's retention thereof was a waiver of prior default.—*Ib.* 408.

Shipping; Contract; Duty.—Where plaintiff was to transport lumber by barge, and was to leave the barge with defendant to be loaded, it was plaintiff's duty by implication to furnish a barge which could be kept afloat by ordinary care to be exercised by the defendant.—*Doran & Co. v. Gilreath*, 377.

Same; Loss of Barge; Damages.—Where plaintiff furnished defendant a barge to transport lumber and defendant, through breach of agreement, permitted the barge to sink, plaintiff may recover not only the difference between the value of the barge before and after its sinking, but also his loss on his contract of affreightment.—*Ib.* 377.

STATUTES.

See Constitutional Law.

1. Special.

Statutes; Special; Time of Election.—Local Acts 1915, p. 394, § 1, does not violate the provisions of subdivision 29, § 104, Constitution 1901, nor the provisions of § 105, Constitution 1901, as it merely provides that the appointees thereunder shall hold office until 1920, when their successors shall be elected, and makes no attempt to provide how or in what manner they shall be elected.—State, ex rel. Brown v. Slaughter, 428.

Statutes; Special; Classification.—A classification made in good faith, based on population as a separation of counties in which there shall be a county treasurer, from those in which the office was abolished, is a valid classification.—State, ex rel. Mims v. Bugg, 460.

2. Title, etc.

Statutes; Title; Comprehensiveness.—Acts 1915, p. 348, is not invalid as violative of § 45, Constitution 1901, since its purpose of abolishing some of the county treasurers is embraced within the comprehensive title, notwithstanding the act does not abolish all county treasurers.—State, ex rel. Mims v. Bugg, et al., 460.

Statutes; Title; Sufficiency.—Local Acts 1915, p. 293, is not violative of § 45, Constitution 1901, declaring that each law shall contain but one subject which shall be clearly expressed in its title.—Dunn v. Dean, 486.

3. Local Laws.

Same; Enactment; Local Laws; Notice.—The body of the bill embracing provisions of law operated during the year 1916, the words "next session" contained in the notice of publication must be construed as meaning "next sitting" instead of "next session," said notice appearing pending the recess of the legislature, and the publication, therefore, must be held sufficient under § 106, Constitution 1901.—Dunn v. Dean, 486.

Same.—As there was no general law providing for a similar body created by Local Acts 1915, p. 293, the law was not invalid as being upon a subject covered by a general law.—Ib. 486.

Statutes; Local Laws; Validity.—As the Act only creates originally the districts for the purpose of defining the territory in which the electorate may vote for a member of the board resident of that district and assigns a member of the board to each of the districts, Local Acts 1915, p. 293, is not violative of §§ 29 and 104 of the Constitution of 1901.—Dunn v. Dean, 486.

Same.—As the compensation theretofore allowed the probate judge was for mere incidental services, and the act relieved him from the duties theretofore imposed upon him by law, Local Acts 1915, p. 293, was not invalid as violative of § 104, subdivision 24, Constitution 1901, since it merely withheld compensation allowed for services for duties that were dispensed with.—Ib. 486.

Same; Journal.—In determining whether an act was passed with all constitutional formalities, the courts can look only to the journals of the legislative houses.—Ib. 486.

Same; Validity.—Where the journal showed the introduction of Local Acts 1915, p. 293, and its reference to the standing committee on ways and means, and then recited the consideration and favorable report of the bill by the standing committee on mines and manufactures, it failed to show a compliance with § 62, Constitution 1901, and was consequently invalid.—Ib. 486.

4. Amendment and Repeal.

Statutes; Amendment; Repeal by Implication.—Where an amendment changes the old law in its substantial provisions, it, by necessary implication, repeals the old law so far as its provisions are in conflict.—Allgood v. Sloss-S. S. & I. Co., 500.

STATUTES—Continued.

Same.—Whether in the form of an amendment or otherwise, if a new law covers the whole subject matter of a former law, and is inconsistent with it, and is evidently intended to supersede the old law, it repeals it by implication.—*Ib.* 500.

Same.—Where a statute is amended, “so as to read as follows,” the amendatory act becomes a substitute for the original, and the original ceases to have the cause and effect of an independent enactment, but so much of the original as is retained in the amending act without substantial change, is affirmed and continued in force without interruption, and such parts as are omitted are repealed.—*Ib.* 500.

Same; Re-enactment.—The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed as a continuation of the original statute, and not as an implied repeal.—*Ib.* 500.

4. Partial Invalidity.

Statutes; Partial Invalidity; Effect.—If the invalid section may be stricken from the Act, leaving a statute complete within itself, sensible and capable of being executed, the striking of the invalid section does not overthrow the entire act. This rule saves Local Acts 1915, p. 293, notwithstanding § 16 thereof is invalid.—*Dunn v. Dean*, 486.

5. Enactment.

Statutes; Enactment; Report on Bill.—As the reference of the bill embraced in Local Laws 1915, p. 98, to a standing committee of the senate, is not affirmatively shown by the journal of the senate, the bill never properly became a law, since it violates the provisions of § 62, Constitution 1901.—*State, ex rel. Knox v. Dillard*, 539.

6. Construction.

Statutes; Construction; Ejusdem Generis.—The maxim “*Ejusdem Generis*” by which general words following the enumeration of a particular class of persons or things will be construed as applicable only to persons or things of the same general nature or class as those enumerated, is only an illustration of the broader maxim, “*Noscitur a Sociis*,” and, where applicable, does not require that the general terms be entirely rejected, and where it can be ascertained that the particular word by which the general word is followed was inserted for a distinct object, and not to give color to the general word, it becomes a rule of intention.—*State v. W. U. Tel. Co.*, 570.

Same; Noscitur a Sociis.—The maxim “*Noscitur a Sociis*” means that general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to that of the less general.—*Ib.* 570.

Same; Giving Effect to Every Part.—If possible, every part of a statute should be upheld and given appropriate force.—*Ib.* 570.

Statutes; Construction.—Local Acts 1915, p. 20, is not violative of the Constitution either of § 104 or § 106, the publication of the intent to apply therefor having been published only in Marengo county, since the holding of the court in that county and its detachment from the first circuit in no manner affected the other counties in the district.—*Dawson v. The State*, 593.

STREET RAILWAYS.

1. Use of Streets by.

Street Railways; Use of Street; Excavation; Danger Signal.—The sufficiency of signals or barriers to give reasonable warning of or security against existing danger with respect to their character, number and ar-

STREET RAILWAYS—Continued.

angement is generally a question of fact for the jury.—*Kearns v. Mobile L. & R. R. Co.*, 99.

Same.—Under the evidence in this case the question whether two rows of red lights placed on each side of the track about eight feet apart, there being an excavation between the rails, constituted a reasonable and sufficient warning to travelers not to pass along the car track between the lights, was a question for the jury.—*Ib.* 99.

Same; Pleading; Construction.—Where the action was for damages for injury to an automobile, and the complaint charged the negligent failure to guard an excavation with proper and sufficient danger signals, a plea alleging by way of conclusion that plaintiff assumed the risk of driving between the lights was necessarily to be regarded as a plea of the general issue.—*Ib.* 99.

Street Railroads; Use of Street; Nuisance.—A street railroad is not per se a public or private nuisance so long as its use of the street does not necessarily interfere with ordinary travel, and is not a substantial impairment of the private rights of property.—*B'ham E. & B. Ry. Co. v. Stagg*, 612.

Street Railways; Light in Street; Construction of Track.—A street railroad using a public street must lay and maintain its track so as to cause as little injury or inconvenience to the public as possible.—*Ib.* 612.

Same; Jury Question.—Whether in a given case the rails of a street car track are so laid or maintained as to constitute negligence, is usually a question for the jury, depending upon particular circumstances, though there may be cases when the court may determine it as a matter of law.—*Ib.* 612.

Same; Construction of Track; Due Care.—Independently of statutes and ordinances, street railways are bound to construct and maintain their roads, rails, etc., so that the use of the street by the public shall not be materially impaired or made dangerous; at least so far as is practicable and consistent with the use of the street.—*Ib.* 612.

Same; Injuries on Track; Negligence.—A street railroad is liable to an individual for injuries proximately resulting from its obstruction of the streets, or for other negligence chargeable to it, which it should or could have avoided by the exercise of reasonable care.—*Ib.* 612.

Same; Pleading.—Allegations that defendant maintained a street railroad, that plaintiff while riding a motorcycle collided with the rail, and was thrown to the ground and injured as a proximate result of the negligence of defendant in permitting the rail to stand above the level of the street, sufficiency show a duty owing by defendant to plaintiff, the breach thereof and injury to plaintiff as a proximate result.—*Ib.* 612.

Street Railways; Injury on Track; Ordinances.—Where plaintiff's motorcycle struck a street car rail projecting above the grade of the street, and plaintiff was thrown and injured, counts declaring on negligence in the violation of ordinances as to the maintaining of street car tracks, the ordinances were admissible, notwithstanding defendant put in evidence his franchise, such franchise not repealing the ordinances, but requiring obedience thereto.—*Ib.* 612.

2. Transfers.

Carriers; Passengers; Transfer; Refusal to Issue.—The instructions examined and held sufficient as to damages to which a passenger is entitled for the refusal of a street railway company to issue a transfer.—*B. R. L. & P. Co. v. Cohill*, 278.

3. Injury on Track.

Street Railways; Injuries on Track; Jury Question.—Where the action was for damages to an automobile, and the count of the complaint ascribed

STREET RAILWAYS—Continued.

its injuries to simple negligence of the operators of defendant's street cars, after discovery of the perilous situation of the automobile near the track ahead of the car, the question of defendant's negligence is for the jury under the evidence in this case.—*B. R. L. & P. Co. v. Sprague*, 148.

SUBROGATION.

Subrogation; Surety; Right.—A legal subrogation, as distinguished from conventional or contractual subrogation, does not arise until the surety has paid or offered to pay the debt for which the principal is liable to protect his own rights or interest.—*Aetna Ins. Co. v. Hann*, 234.

Same; Conventional or Contractual.—Conventional or contractual subrogation rests upon an express contract to that effect.—*Ib.* 234.

Same; Nature and Theory.—Subrogation is a substitution of one creditor for another, a means whereby the equity of one debtor is worked out through the legal right of the creditor so as to force the final payment of the debt out of him or those who are primarily liable therefor, and whereby one of several debtors who pays the debt is made a creditor in lieu of the original creditor against other debtors who have not paid, to the amount paid.—*Ib.* 234.

Same; Insurer; Action Against Party Primarily Liable.—A bill by several insurance companies to enjoin the prosecution of several actions at law by the insured on their policy, which shows that insured has not received anything from either of the parties primarily liable, or from the insurer secondarily liable, and that he had recovered against the party primarily liable, whose appeal was then pending, but which does not show that such action was collusive or fraudulent as to the insurer because not first proceeding against the insurer, and then allowing the insurer to sue the party primarily liable in the name of the insured, did not show any right in the insurer to subrogation to the rights of the insured against the parties primarily liable.—*Ib.* 234.

Subrogation; Right of Surety; Payment.—Where plaintiff signed a mortgage for the purchase price of a mule bought by his principal, the debtor in the judgment, as the surety only, and after the law day of the mortgage had passed, paid the amount due on the mortgage, which was marked paid, and thereafter judgment was obtained against the principal debtor, and the mule was taken under execution on the judgment, plaintiff was entitled to the mule, being subrogated to the rights of the mortgagee under §§ 5389 and 5394, Code 1907.—*Thrasher v. Neeley*, 576.

Subrogation; Right to; Effect.—Under § 5394, Code 1907, a surety who paid a chattel mortgage is entitled to subrogation, as to other creditors of his principal, although he did not have the mortgage transferred to him as authorized by § 5385, Code 1907, and hence, might not have priority as to innocent purchasers.—*Ib.* 576.

TAXATION.

Taxation; Tax Year.—The tax year commences October 1st, and ends September 30th following.—*State v. Doster-N. Drug Co.*, 447.

Same; Assessment; Nature.—The assessment and valuation of property is in its nature a judicial determination, and is final, unless impeached for fraud or lack of jurisdiction.—*Ib.* 447.

Same; Escapes.—Section 2260, Code 1907, expressly confers upon the county tax commissioner authority to make assessments for escaped taxes for not more than five years preceding.—*Ib.* 447.

Same; Correction; Time of Making.—Where the county tax commissioner has duly assessed escaped taxes, and the tax payer has concurred, and the taxing authorities seek no review or annulment thereof within the tax year, the assessment becomes final and binding on the authorities and the taxpayer after the expiration of the tax year.—*Ib.* 447.

TAXATION—Continued.

Same; State Commission; Power.—Notwithstanding the right of general and complete supervision is given to the State Tax Commission by § 2223, Code 1907, yet in view of the provision of § 2260, Code 1907, and the other statutes, the power of the State Tax Commission to set aside valuations and assessments must be exercised before the end of the current tax year.—Ib. 447.

Same; Escapes; When Payable.—After an escaped assessment is made, it becomes due and payable and enforceable, except that a 10% penalty is added by § 2266, Code 1907.—Ib. 447.

Taxation; Collection; Liability on Bond.—Where a tax collector authorized the county treasurer to apply taxes collected for a certain year on those due for the preceding year, or knowingly permitted such application without objection, he was guilty of a conversion of the taxes collected, rendering him and his bondsmen liable.—State, Use, etc. v. Tingle, 505.

Taxation; Sale; Notice.—Under § 2272, Code 1907, the record, although importing notice to Georgia Armstrong, did not import notice to her personal representative, she having died before the rendition of the decree directing a sale of the property for taxes.—Gilliland v. Armstrong, 513.

Same; Jurisdiction of the Probate Court.—In proceedings for the sale of property for delinquent taxes, the jurisdiction of the probate court is limited and statutory, and in order to sustain its judgment, the record must show the facts essential to its jurisdiction, in the absence of other proof of the regularity of the proceedings that went before.—Ib. 513.

Same; Lost Notice; Proof.—It is competent to prove its contents where the notice of a tax sale given to the person assessed, or to his personal representative, has been lost or mislaid.—Ib. 513.

Same; Deed as Evidence.—The probate judge's deed in a tax sale is only prima facie evidence of the regularity of all proceedings subsequent to the judgment recited by them, and does not cure defects in the record of the judgment, and its necessary antecedent proceedings under § 2397, Code 1907.—Ib. 513.

Taxation; Statutes; Construction; Telegraph Company.—Construing §§ 2143, 2144 and 2145, Code 1907, it is held that a telegraph company must return to the auditor all properties of all kinds, including its office fixtures, etc.; the doctrine of ejusdem generis not limiting the property returnable to the poles, batteries, etc., as used in the business.—State v. W. U. Tel. Co., 570.

Taxation; Execution; Summary Remedy.—Under § 1313, Code 1907, an execution issued for taxes is a nullity unless there has been written assessment of the property to the owner.—Town of Albertville v. Hooper, 642.

Same; Assessment.—The term "assessment" commonly includes both the preparation of a list comprising a description of the persons or property liable, and an estimate of the value of the property.—Ib. 642.

Same; Necessity.—An assessment is an indispensable prerequisite to the validity of a tax against an individual.—Ib. 642.

Same.—Where the assessment books showed no personal property and made no reference thereto, except certain entries in red ink, explained orally as being the method of designating personal property values, and the assessment roll was not made by any authorized person, the assessment was a nullity.—Ib. 642.

Same; Wrongful Sale; Remedy.—Where, without authority of law, a municipality sells property under tax execution, the owner may waive the tort, ratify the sale, and recover the purchase money received by the municipality.—Ib. 642.

Taxation; Unlawful; Recovery.—It is no defense to an action to recover the value of property sold for taxes, to say that the tax payer may be

TAXATION—Continued.

ultimately liable for such taxes, since to allow such defense, would be to legalize the trespass.—*Ib.* 642.

TELEGRAPHS AND TELEPHONES.

Telegraphs and Telephones; Change in Words; Liability.—Where a telegraph company in transmitting a message changed the wording so as to induce the addressee to believe that his wife, instead of her father, had been operated on, it was guilty of a breach of contract, and liable at least in nominal damages.—*W. U. Tel. Co. v. Favish*, 4.

Same; Transmission; Duty.—A telegraph company is bound to exercise due care and skill to transmit and deliver messages with substantial accuracy.—*Ib.* 4.

Same; Damages; Jury Question.—Where the telegram as filed read "Papa operated on" and it was delivered so as to read "Have operated on" the court properly submitted to the jury the question whether addressee could reasonably have concluded from the message as delivered, that his wife had been subjected to a surgical operation, especially where it appeared that she had not entirely recovered from an operation previously performed.—*Ib.* 4.

Same; Evidence.—In such a case it was competent to show that the sender wife of the addressee had not entirely recovered from an operation performed sometime before.—*Ib.* 4.

Same; Tort; Damages.—Where the addressee could reasonably conclude from the message as delivered to him that his wife instead of her father had been subjected to a surgical operation, the expense of a prompt journey made by him to be with her is recoverable as a part of the damages under a count of the complaint, stating a cause of action in tort.—*Ib.* 4.

Telegraphs and Telephones; Transmission; Change; Damages.—Where the addressee of a telegram was induced by the change in the message to believe that his wife and not her father had been operated on, the action of the addressee in undertaking a trip so as to be with his wife, was a consequence of the breach of the contract to correctly transmit the message which was within the contemplation of the contracting parties even though the precise happening which followed the breach might not have been foreseen.—*Ib.* 4.

Same.—In such an action where the cause of action was set forth in two counts, one *ex delicto*, and one *ex contractu*, the damages recoverable included not only the expense of the trip so undertaken in consequence of the change, but also the cost of the message and the value of the time lost by the addressee in making the trip.—*Ib.* 4.

Same; Law Governing.—A contract made in Alabama to transmit a message and deliver the same in Illinois was presumably an Alabama contract, controlled, in respect to the consequences of its breach, by the laws of Alabama; hence, damages for mental distress unaccompanied by physical injury were recoverable, notwithstanding they would not have been recoverable under the laws of Illinois.—*Ib.* 4.

Telegraphs and Telephones; Transmission; Instruction.—Where the complaint contained two counts, one *ex contractu*, and the other *ex delicto*, and it appeared that damages for mental distress, though recoverable under one count, and not recoverable under the other, error cannot be predicated upon the refusal of instructions which failed to recognize this distinction.—*Ib.* 4.

Same.—In this case the giving of an instruction that plaintiff testified that he derived from the message that his wife had been operated on, invaded the province of the jury, and required a reversal where it appeared that plaintiff did not so testify.—*Ib.* 4.

TELEGRAPHS AND TELEPHONES—Continued.

Telegraphs and Telephones; Limiting Liability; Persons Bound.—Although ignorant thereof, the sender of a telegram is bound by the reasonable conditions printed on the blank, unless such ignorance is due to his honest mistake, or the company's fault.—*W. U. Tel. Co. v. Miller*, 620.

Same.—Where the sender is the agent of the sendee of a telegram, the sendee is bound by the reasonable stipulations, although his agent had no actual knowledge of the stipulations.—*Ib.* 620.

Same.—The provision on a telegraph blank that the company would not deliver beyond a certain radius from its office, except as the agent of the sender, is subject to parol waiver.—*Ib.* 620.

Same.—If the company knowing that the address on the message was beyond its delivery radius, undertook to deliver the message upon the payment of the usual charges, it waived the provision that it would not deliver beyond a certain radius from its office.—*Ib.* 620.

Same; Damages; Replication.—The replication examined and held to sufficiently state the facts constituting a waiver of the company of certain provisions exempting it from liability.—*Ib.* 620.

Same; Negligence.—A printed provision on a telegraph blank exempting the company from liability, while delivering a message beyond its regular delivery radius, will not exempt it from liability for negligence.—*Ib.* 620.

Same; Plea.—The plea setting up that the sender was negligent in not furnishing the sendee's correct address, is not sufficiently met by a replication alleging that the sendee could have been located through the address given, but stating no facts showing a duty to inquire, or how the given address would help.—*Ib.* 620.

Telegraphs and Telephones; Evidence; Burden of Proof.—Where the complaint sought damages for the failure of plaintiff to attend a funeral caused by delay in the transmission of a telegram, the plaintiff has the burden of proving that he would and could have attended had the message been promptly delivered.—*Ib.* 620.

TIME.

Time; Day.—As defined by statute, and within the meaning of the law a day means twenty-four hours—the period of time intervening between any midnight and the midnight following.—*City of B'ham v. McKinnon*, 56.

Time; Compensation.—Under § 11, Code 1907, in calculating the time as fixed by a statute within which an act may be done, the first day is excluded, and the last day included.—*Rice v. Beavers & Co.*, 355.

Same; Within.—The use of the word "within" as a limit of time or degree or space, embraces the last day or degree, or entire distance fixed, or covered by the limit.—*Ib.* 355.

TORTS.

Torts; Law Governing.—The measure and element of a recovery of damages for a tort is that prescribed by the law of the place where the tort is committed.—*W. U. Tel. Co. v. Favish*, 4.

TRADE MARKS AND TRADE NAMES.

Trade Marks and Trade Names; Imitation; Injunction.—Equity will grant injunctive relief against those who, by imitative devices, symbols or practices seek to divert or appropriate the trade or patronage which would otherwise go to another established business, on the principle that the good will of the business is a valuable property right, and that the public, intending to patronize a particular business, ought not to be misled or deceived as to its identity.—*Boston Shoe Shop v. McBroom Shoe Shop*, 262.

Same; Unfair Competition.—A similarity sufficient to convey a false impression to the public mind, and of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such

TRADE MARKS AND TRADE NAMES—Continued.

matters, is sufficient to give the injured party right of redress, regard being had to the class of persons who purchased the particular article for consumption, and to the circumstances ordinarily attending the purchase, but without requiring a nice discrimination from the ordinary purchaser; the mere existence of differences which are patent to the observing and well informed person, does not necessarily amount to a sufficient differentiation, and similarity in the main distinguishing features will usually be sufficient to constitute infringement or unfair competition.—*Ib.* 262.

Same; Similarity.—The trade devices considered and it is held that respondent's trade device was designed to imitate that used by complainant, that the imitation was such as might readily deceive the average patron of complainant's business, divert some of its patronage, and was unfair competition, such as would be enjoined.—*Ib.* 262.

Same.—While the design is significant and may be of controlling importance in some cases, neither design nor actual fraud in such an imitation of complainant's trade device is a necessary element of the right to relief on the ground of unfair competition.—*Ib.* 262.

Same; Deception.—It is not necessary to show that any person had been actually deceived by respondent's mark or device on bill filed to enjoin an unfair competition.—*Ib.* 262.

TRESPASS.

Trespass; Party Entitled to Sue; Possession.—A lessor not in possession cannot sue in trespass for the wrongful removal of fixtures placed on the premises by the lessee.—*Middleton v. Ala. Power Co.*, 1.

Trespass; Realty; Personalty.—Damages to personal property inflicted by entering the land under a probate decree condemning it for a railroad right of way, does not constitute a trespass against the realty.—*Smith v. Jeffcoat*, 96.

TRIAL.**1. Reception of Evidence.****(a) Objection.**

Trial; Reception of Evidence; Objection.—Where the action was for damages for the incorrect transmission of a message, and the complaint contained two counts, one *ex delicto* and the other *ex contractu*, and a deposition was offered without any specification of its purpose, it being admissible under the *ex delicto*, but not under the count *ex contractu*, its exclusion on a general objection was not ground for a reversal; the rule is that where evidence admissible for one or more purposes is offered without a restriction to the purpose to which it is admissible, and the objection interposed is general, the judgment will not be reversed whether the court sustains or overrules the objection.—*W. U. Tel. Co. v. Favish*, 4.

Trial; Reception of Evidence; Portions.—Where a portion of a letter introduced in evidence is irrelevant, a general objection to the admission of the entire letter does not present the question of the admissibility of the particular portion.—*Beatty v. Palmer*, 67.

Trial; Reception of Evidence.—Where counsel for defendant offered answers to interrogatories in evidence, but withdrew them before they were read to the jury, no instruction to disregard such evidence was necessary.—*Russell v. Bush*, 309.

Trial; Reception of Evidence; Objectionable in Part.—Where the objection went to the whole testimony, a portion of which was competent, the objection was properly overruled.—*Colley v. Atlanta B. & I. Co.*, 374.

Trial; Reception of Evidence; Showing Grounds.—Before a party can put the trial court in error for refusing to permit questions to be answered

TRIAL—Continued.

by a witness, he must inform the court what pertinent matter the answer will elicit.—*Georgia C. Co. v. Lee*, 599.

2. Conduct of Counsel.

Trial; Conduct of Counsel; Qualifying Jurors.—A request and its allowance that the jurors be qualified on the point as to whether they were interested in the indemnity company, attorney for plaintiff stating that he understood that an indemnity company was interested in the case, was not erroneous, since it was not sufficient to create bias.—*Beatty v. Palmer*, 67.

Trial; Exclamation of Counsel.—Where defendant's chief witness was being examined, and, immediately following his denial of a fact which seems to have been overwhelmingly established, the exclamation of plaintiff's counsel: "Look out, now, hold on! watch how you testify! somebody may be indicted for perjury!" was improper.—*Headley v. Harris*, 520.

Appeal and Error; Harmless Error; Conduct of Counsel.—Where witness's testimony was in no wise affected thereby, and the witness retracted nothing, but pointedly supported every fact relied upon by defendant, improper exclamations of counsel was not prejudicial.—*Ib.* 520.

Same; Review; Assignment.—Where the objection invokes no ruling of the court, it affords no basis for an assignment of error with respect thereto.—*Ib.* 520.

3. Jury Question.

Trial; Jury Question.—The weight and value of opinion evidence is a matter to be determined by the jury trying the case.—*Beatty v. Palmer*, 67.

Trial; Province of Court and Jury.—The relevancy and competency of the evidence is for the court, its credibility and weight for the jury.—*Russell v. Bush*, 309.

4. Verdict.

Trial; Verdict; Change.—Where the action was against a city and its police officer for personal injuries inflicted upon plaintiff's minor son, and the jury returned a verdict for plaintiff, with damages against the city in the sum of \$50, and against the officer in like amount, the action of the court in changing the verdict to a verdict for plaintiff in the sum of \$100 was erroneous, as it was a change not only of the form, but of the very substance of the verdict in respect to the liability of each of defendants.—*City of B'ham v. Hawkins*, 127.

Same; Apportionment.—Where the suit is against joint tort feorsors, a jury cannot sever by apportioning the damages, as such an apportionment is impractical, since as soon as there is one satisfaction, the remedy is extinct as to all other joint tort feorsors.—*Ib.* 127.

Trial; Verdict; Form.—Where the verdict was for plaintiff with damages against defendant in separate amounts, the trial court should have refused to receive the verdict, and should have sent the jury back for further consideration.—*Ib.* 127.

Same.—There is no particular form in which the verdict may be rendered, it may be either written or oral. General verdicts are sufficient if they respond in substance to every material fact involved in the case, and when the verdict is so responsive, the court commits no error in putting it in form.—*Ib.* 127.

Same; Modification; Substance.—Where a verdict is imperfect in substance, and does not respond affirmatively or by necessary implication to the issues as formed, the presiding judge cannot put it in form, as his attempt to do so would be the verdict of the court, and not the verdict of the jury.—*Ib.* 127.

Appeal and Error; Verdict; Conclusiveness.—Where a verdict depends upon the credence given by the jury to the witnesses examined, such verdict

TRIAL—Continued.

cannot be held to be contrary to the evidence.—*B. R. L. & P. Co. v. Sprague*, 148.

5. Objections to Evidence.

(a) Time.

Trial; Objection to Evidence; Time.—Unless the questions are answered before counsel has an opportunity to object, objections not made until after the questions are answered, came too late.—*Peoples Shoe Co. v. Skally*, 349.

6. Reading Evidence.

Trial; Discretion of Court; Reading Evidence.—It is discretionary with the trial court whether it will permit the official stenographer to read excerpts from the evidence to the jury.—*Landers v. Hayes*, 533.

TROVER AND CONVERSION.

Trover and Conversion; Evidence.—The evidence examined and held sufficient to sustain a verdict finding that defendant converted the cow.—*Ward v. Limblad*, 146.

TRUSTS.

Trusts; Resulting; Parent and Child.—Where the parent or husband pays the consideration for a conveyance to a child or wife, the presumption of an advancement arises and not a presumption of a resulting trust.—*Waddail v. Vassar*, 184.

Same; Bill; Establishment.—Where the bill sought to have a resulting trust declared and alleged that plaintiff paid the consideration to one reared and regarded as a son, to purchase land for her (complainant), and that he had conveyance made to him, it was sufficient to rebut the presumption of advancement arising from the relation.—*Ib.* 184.

Same; Laches.—No hostile, adverse possession prior to the sale being alleged neglect to file bill to establish resulting trust from the time title was taken in the name of another, in 1902 and 1908, until less than two years after respondent undertook to sell, in 1913, some of the land, will not be deemed laches on demurrer which confesses that respondent is the holder of only the dry, legal title.—*Ib.* 184.

Same.—The establishment of a resulting trust is not defeated on the ground of laches by the conveyance of the land by respondent to his wife on the recited consideration of one dollar, and love and affection, the conveyance being made prior to the filing of the bill, as such conveyance does not confer any greater or different right than the respondent possessed.—*Ib.* 184.

Trusts; Resulting; Time of Purchase.—Where one person furnishes money for the purchase of land, and the title is erroneously or wrongfully taken in the name of another, the money must have been paid before or at the time of the purchase, to establish a resulting trust; "time of purchase" meaning the time of acquisition of title, legal or equitable.—*Guin v. Guin*, 221.

Same; Rights of Creditors or Purchasers; Statutes.—Under § 3413, Code 1907, no such trust, whether implied by law, or created or declared by the parties can defeat the title of creditors or purchasers for a valuable consideration without notice, if the creditor be a creditor with a lien.—*Ib.* 221.

Same; Resulting; Establishment Against Mortgagee; Notice; Burden.—Where the bill is by the wife to enforce a resulting trust in land standing in the name of her husband, and is filed against the transferee of the mortgage of the husband, the burden was on complainant to show that such mortgagee had prior notice of complainant's equitable claim, such mortgagee being a purchaser for value.—*Ib.* 221.

UNLAWFUL DETAINER.

Unlawful Detainer; Removal of Cause.—The provisions of § 4283, Code 1907, are not applicable to an unlawful detainer action where an entry as a tenant must be proven under § 4263, and under § 4271, Code 1907, the title is not involved.—*Ex parte Edwards*, 638.

USURY.

Usury; Contract; Obligation.—The limit of a debtor's obligation under a usurious contract is the payment of the principal under § 4623, Code 1907.—*Miller v. Graham*, 230.

Same; Definition.—The taking of a greater compensation than the law allows for the use of money is usury.—*Ib.* 230.

Same; Loan Broker; Compensation.—An agreed compensation to a loan broker for his services in procuring a loan does not affect the loan with usury.—*Ib.* 230.

Same; Pleading.—A pleading asserting usury as the basis of relief in equity or as a defense otherwise, must state the amount of the usurious interest, as well as the facts out of which the illegal exaction was made, or under which it was paid.—*Ib.* 230.

Same.—Where the bill was for equitable relief against a usurious mortgage, and alleged the principal to be the net amount received by complainant, and not that amount plus the broker's commission, the bill was not subject to demurrer on that specific ground, the complainant having fully submitted to the jurisdiction of the court, and unreservedly offered to pay whatever sum the court adjudged as her obligation.—*Ib.* 230.

VARIANCE.

See Appeal and Error, § 7.

VENDOR AND PURCHASER.

Vendor and Purchaser; Lien; Bill to Enforce.—Since the proceedings would not affect his title, the mortgagee was not a necessary party to a bill to perfect and enforce a vendor's lien subject to his mortgage.—*House v. Davis*, 153.

Same; Bona Fide; Rights of.—A bona fide purchaser for value and without notice will be protected pro tanto to the extent that he pays before notice of a latent equity.—*Ib.* 153.

Same; Lien; Bill.—Where the bill sought the perfection of a vendor's lien, it was not demurrable though it showed that complainant's vendee had sold the land to another, where it did not show or admit that the last grantee was a bona fide purchaser for value, and without notice, or that he had paid any of the consideration, or had assumed irrevocable obligation.—*Ib.* 153.

Vendor and Purchaser; Bona Fide; Notice.—Where a co-tenant after parol partition and allotment to him of his portion of the land and his assumption of immediate possession, conveyed other portions of the tract of which he was not in possession, his purchaser was charged with notice of fact sufficient to put him on inquiry that would lead to notice of the true status of the title.—*Betts v. Ward*, 248.

Same; Possession.—Where the grantor had no title or possession of the land conveyed, his purchaser is not a bona fide purchaser for value and without notice.—*Ib.* 248.

Same; Quit Claim Deed.—A grantee under a quit claim deed is put on inquiry, and is not a bona fide purchaser without notice.—*Ib.* 248.

VERDICT.

See Trial, § 4.

WATERS AND WATER COURSES.

1. Overflow.

Waters and Watercourses; Overflow; Damages.—Where the action was by the husband and wife for injuries consequent upon an overflow a refusal of a charge that plaintiff cannot recover for mental anxiety by reason of the illness of their children was erroneous.—*Brookside-P. M. Co. v. McAllister*, 110.

2. Public Supply.

Waters and Water Courses; Public Supply; Connection.—The rule that a water company must extend the same public service without discrimination to all in like circumstances, does not require the water company to make connections for private consumers.—*B'ham W. W. Co. v. Hernandez*, 438.

Same.—The charter of a water works company authorizing it to distribute water and lay pipes and make excavations through streets, alleys or public grounds, creates no duty on the company to do more than lay its mains, since it cannot compel the owner of property to take water; hence, the question whether connections for private consumers should be made at the expense of the company or the consumer, depends upon the contract between the company and the consumer.—*Ib.* 438.

Waters and Water Courses; Public Supply; Maintaining Service Pipes.—The duty to maintain service pipes for supplying private consumers with water is the same as the duty to lay them, and rests upon the same party, whether company or consumer.—*Ib.* 438.

Same; Franchises; Condition.—In granting franchises for the furnishing of a water supply, municipalities may require the company, if so authorized by statute, to connect service pipes with their mains as part of the consideration for the transaction; but if the charter or contract does not so provide, such connections are left to the agreement of the parties.—*Ib.* 438.

Same; Franchises; Construction.—Ambiguous provisions in the grant of a public franchise will be construed in favor of the public.—*Ib.* 438.

Waters and Water Courses; Public Supply; Private Consumers; Contracts.—In the absence of special contract provisions, the courts will be slow to hold that a consumer of water has become bound by the acquiescence of other consumers, over whom he has no control, in a custom requiring consumers to pay for connection with water mains.—*Ib.* 438.

Same; Franchises; Presumption.—Where the municipal authorities contracted with a water company for a supply of water for the municipality, it will be presumed that they acted competently as the agent of all the people of the city, and that they knew the state of the matter in which they undertook to act.—*Ib.* 438.

Same; Connection for Private Consumer.—In the absence of a franchise provision to the contrary, the custom of a water works company requiring private consumers to install service pipes for connection with the main, is not unreasonable, and the courts will not require such company to pay for such installation by granting a mandatory writ.—*Ib.* 438.

WILLS.

Wills; Construction; Estate Devised.—A devise of real property to one without limitation or restriction vests in such one a fee simple title to the property.—*O'Connell v. O'Connell*, 224.

Same; Words of Survivorship; Effect.—A testatrix had three married daughters whose husbands had not been successful from a business standpoint, an unmarried daughter, a son in ill health, and two other sons in whom she reposed confidence. She devised and provided that the real property bequeathed to each of her daughters should be held for life, with re-

WILLS—Continued.

mainder over to her children, with power to sell upon the written consent of her executors, and to reinvest the proceeds on the same limitation, devised certain real estate to complainant, a son, devised to the unmarried daughter certain realty not subject to the provision as to sale, etc., provided for the son in ill health, and made a disposition of property not otherwise disposed of, specifically to her children, with the provision that her daughters should hold under the conditions of the first provision, and then made a provision that if any child died leaving child or children, such child or children should stand in the place of the parent, and if any child died intestate without issue, the property devised to him should go to his brothers and sisters or their children. The words of survivorship in the final provision were intended, therefore, to provide against the death of the objects of the gifts in the lifetime of the testatrix, and *prima facie* referred to her death. Hence, such provision could not cut down the fee simple estate of complainant, nor the fee simple estate of the unmarried daughter.—*Ib.* 224.

Same; Intention of Testator.—In the construction of a will the cardinal rule is to ascertain the intention of the testator and to give it effect if it is not prohibited by law.—*Ib.* 224.

Same; Cutting Down Gift.—A clear gift is not to be cut down by anything which does not indicate an intention to do so with reasonable certainty.—*Ib.* 224.

Same; Words of Survivorship.—Where a gift is to take effect in possession immediately upon the death of the testator, words of survivorship are regarded as intended to provide against the death of the object of the gift in the testator's lifetime, and *prima facie* refer to the death of the testatrix.—*Ib.* 224.

Same; Death.—Rules of construction are adopted as an aid to the court in ascertaining the intention of the testator where from the provisions of the will such intention is doubtful.—*Ib.* 224.

WITNESSES.**1. Impeachment and Bias.**

Witnesses; Impeachment.—An engineer in charge of a train which killed intestate could not be impeached by proof that shortly after the accident the engineer stated that deceased ought to have been killed, as he should not have been on the track, since such statement was not part of the *res gestae*, and not admissible as against the railroad company in an action for killing deceased, and hence, such evidence was not properly received, although the engineer denied making the statement.—*So. Ry. Co. v. Fricks*, 61.

Witnesses; Bias.—Notwithstanding the jury is not bound to accept the testimony of a biased witness without reserve, yet the testimony of a witness may not be capriciously rejected.—*A. G. S. R. R. Co. v. Smith*, 77.

Witnesses; Impeachment.—After proper predicate laid it is competent to show that the general manager of defendant company, a witness in the case, the defense depending on his testimony, had been talking with the witnesses in the case, asking them as to what they would testify, what the witnesses had told defendant's counsel, and that the manager told the witnesses they should or must change their testimony.—*Peoples Shoe Co. v. Skally*, 349.

Same.—A predicate is required before a witness can be impeached by contradictory statements, to prevent surprise and give him an opportunity to explain; if his attention is called to the time and place, circumstances and persons involved, and the statements made, the rule is satisfied.—*Ib.* 349.

Same.—A witness cannot defeat the introduction of contradictory statements offered to impeach him by stating that he does not remember, etc.—*Ib.* 349.

WITNESSES—Continued.

Witnesses; Impeachment; Character.—In impeaching a witness for bad character, the proper inquiry is as to the general character of the witness sought to be impeached, and it need not be limited to truth and veracity.—*Brown v. Moon*, 391.

Witnesses; Impeachment; Predicate.—Where defendant relied upon a deed from plaintiff which plaintiff claimed was forged, it was proper as laying a predicate for impeachment for defendant to inquire of plaintiff if she had not told a third person that she had deeded the land to defendant.—*Qualls v. Qualls*, 524.

Witnesses; Impeachment.—It is not permissible to ask one witness if another witness is not mistaken in his statement as to the use of certain language.—*Georgia C. Co. v. Lee*, 599.

Witnesses; Impeachment; Showing.—While an absent witness may be impeached by proof of bad character, he cannot be impeached by proof of contradicted statements made in a showing for him, to effect a continuance, although such showing had been admitted by the opposite party, since the necessary predicate could not and cannot be laid.—*Holt L. Co. v. Givens*, 640.

2. Competency.

Witnesses; Competency; Knowledge.—The testimony of a physician that he believed he treated plaintiff for hernia last spring, and believed he remembered plaintiff telling him that it was bothering him some, was properly received.—*L. & N. R. R. Co. v. Jenkins*, 136.

Witnesses; Competency; Transaction with Deceased Agent.—Where the bill was by the wife to establish a resulting trust in land standing in the name of the husband, and was filed against a transferee of a mortgagee of the husband, testimony of the husband that while negotiating with the mortgagee he informed the husband of the mortgagee, who was her agent in the matter, that the land in question belonged to the wife of the mortgagor, was not admissible where the husband of the mortgagor was dead. (§ 4007, Code 1907.)—*Guin v. Guin, et al.*, 221.

Witnesses; Disqualification; Declaration of Decedent.—Where the agent of plaintiff's deceased father was material, the widow was competent under the statute to prove statements made by him relative to his age if her interest is not opposed to the interest of his estate.—*Landers v. Hayes*, 533.

3. Confidential Communications.

Witnesses; Confidential Communication.—Where the action was upon a fraternal benefit certificate, and the defense was suicide, a letter written by the attorney of the benefit association to the head office thereof stating that the order was not liable, but recommending a compromise, was not admissible to show formal notice of proof of loss, or waiver thereof, since it was a confidential communication by an attorney containing privileged matter.—*Sovereign Camp W. O. W. v. Ward*, 327.

4. Examination and Cross.

Witnesses; Examination and Cross.—The refusal of the court to permit defendant to cross examine the party who acted for plaintiff as to whether in discussing the matter with the party who bought for defendant, when the sale was over, plaintiff's agent told defendant's agent that the price he received was \$1,800 more than he expected, was proper, since such testimony was not relevant.—*Georgia Cotton Co. v. Let*, 599.

WORDS AND PHRASES.

1. Water Packed.

Words and Phrases; "Water Packed."—A water packed bale of cotton is one to the lint of which water is added in such a manner that the weight is increased, or in which water damaged cotton was placed, or the sampling

WORDS AND PHRASES—Continued.

sides of which are packed with cotton not so wet or water damaged. If, however, the seed cotton entering into the bale was merely green or damp when ginned and pressed, and no water or moisture, or other extraneous matter is added by human agency, such bale is not fraudulent or water soaked.—*Wallace v. Crosthwaite*, 356.

WORK AND LABOR.

Work and Labor; Partial Performance; Quantum Meruit.—Where the contract to drive the well was entire, and plaintiff failed to fully and substantially perform, he could not recover the value of the labor expended in partial performance, without more.—*Hartsell v. Turner*, 299.

Same.—Where a party has the right to insist on the full performance of the entire contract, but voluntarily accepts the benefit of a part performance, such party is liable for the advantage thus voluntarily accepted; such liability resting not upon the original contract, but upon an implied agreement deducible from the acceptance of a valuable service or thing, but the mere fact that the performer has been benefited is not sufficient to charge the party benefited as upon the quantum meruit.—*Ib.* 299.

Same.—Where plaintiff contracted to drive a well on defendant's premises, and defendant unequivocally rejected it because the water then produced was not a performance of the contract, and plaintiff drilled the well deeper, but without success, and then left it, defendant after having another well bored without success, used the limited supply of water from the well bored by plaintiff for more than four years, and aided his tenants in having the well cleaned out, was liable to plaintiff for the value of the labor spent in boring the well, in no event to exceed what would have been the contract price of boring the well to the depth driven, had it then furnished the contemplated supply of water less the value of the pipe contributed by defendant, the fact being that the well presented no obstacle to the use of his premises by defendant.—*Ib.* 299.

Same; Jury Question.—In this case the amount of the recovery upon quantum meruit was for the jury.—*Ib.* 299.

Work and Labor; Partial Performance; Right of Recovery.—Although recovery cannot be had under a special contract without showing a substantial performance thereof, yet where a partial performance has resulted in benefits accepted by the other party, and the contract was abandoned by mutual consent or was rescinded or extended by some act or failure of defendant, a recovery may be had therefor upon a quantum meruit for the value of the work performed or services rendered.—*Russell v. Bush*, 309.

Work and Labor; Quantum Meruit; Contract.—Recovery on the quantum meruit can be had for the balance due for the executed part of a contract, subject to recoupment for resulting damages from a failure to complete performance, that can be calculated with any degree of certainty.—*Lowy v. Rosengrant*, 337.

